Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRECK M. SWANQUIST,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal conviction, alleging false statements made to a financial institution in order to obtain loans, can be based on alleged false statements not charged in the indictment.

2. Whether the admissibility of summary exhibits and "summary" testimony, prepared and given by government agents in criminal cases, should be based on uniform rules with the district court performing a "gate-keeping" role; *Cf.* The Court's holding in *Kumho Tire Co. v. Carmichael*, __ U.S. __, 119 S. Ct. 1167 (1999).

LIST OF PARTIES

The caption of the case contains the names of all of the parties in the court below.

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Petitioner Breck M. Swanquist respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a - 26a) is reported at 161 F.3d 1064. The opinion of the District Court (App., *infra*, 27a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1998. A timely petition for rehearing was denied on February 2, 1999. (App., *infra*, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...." U.S. Const., Amend. V.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant was convicted of making false statements to several federally-insured banks and financial institutions by delivering self-prepared financial statements and, in two instances, pre-printed mortgage application forms, for the purpose of influencing those banks and financial institutions in "approving, issuing, and renewing" his loans.

This case raises an important question concerning a criminal defendant's Fifth Amendment right to be tried only on those felony charges returned by a grand jury in an indictment. Although the Court's precedent on this issue is uniform and has steadfastly protected this precious constitutional right, the court of appeals essentially ignored the issue in its opinion by suggesting that the constitutional guarantee of being tried only on charges returned by a grand jury does not apply to cases where the petit jury returns a verdict of acquittal on 3 of 16 counts:

> We also note that the jury acquitted Swanquist on three of the sixteen counts, thereby indicating that it paid close attention to the specific allegations of the superseding indictment and was not misled by jury instructions that failed to mirror the indictment's exact language.

App., *infra*, at 23a.

The Court of Appeals' opinion concedes that the jury instructions in this case permitted conviction on "any false statement" which petitioner made in his loan applications; however, the actual charges in the superseding indictment were far narrower and highly specific. The government introduced evidence at trial of additional false statements purportedly made by petitioner not charged in the super-

seding indictment which it argued during closing argument constituted evidence of petitioner's criminal conduct. The government's conduct at trial violated petitioner's rights under the grand jury clause of the Fifth Amendment and petitioner's conviction should be reversed under this Court's decision in *Stirone v. United States,* 361 U.S. 212 (1960).

Additionally, the Court should rule that the "gate-keeping" rules that now apply to expert witnesses in civil cases also apply to the admission of summary exhibits and "summary" testimony by government agents in criminal cases. In this case, a non-expert FBI agent testified as an alleged "summary" witness in which the agent gave opinion testimony regarding complex loan documents, secured transactions and the like, and in which he resolved all matters involving conflicting evidence in the government's favor. In its opinion, the court of appeals treated this testimony as admissible under Rule 1006 of the Federal Rules of Evidence. Other Circuit Courts have ruled such testimony inadmissible under F.R.E. 1006 but have still affirmed the procedure whereby a government witness "summarizes" the government's case under F.R.E. 611(a). Petitioner respectfully suggests that either approach is an abuse of the Federal Rules of Evidence. Essentially, the courts of appeal have grafted onto the Federal Rules of Evidence a new rule which permits the government to present an FBI (or IRS) agent to argue the government's case to the jury in the form of summary testimony. This practice should not be countenanced by this Court; uniform "gate-keeping" rules relating to such testimony should be established.

B. Factual Background

1. Petitioner's "Net Worth" Was Not Included In The Grand Jury Charge; The Indictment Charged That Specific Items In The Financial Statements Were Instead Falsely Stated.

Thirteen of the sixteen counts in the superseding indictment were unusual in that the charge did not relate to petitioner's net worth or total liabilities or total assets or misleading a bank by misrepresenting the total financial statement. Rather, in thirteen of the sixteen counts, selected categories of liabilities were charged as falsely stated. Counts 2 and 3 charged that petitioner's "unsecured" debts were misstated. App., *infra,* 30a-32a. In Counts 4, 5 and 6, the indictment charged, among other things, that the outstanding balance of defendant's "real estate mortgages" was falsely reported. *Id.* at 32a-35a. Counts 7 and 8 of the indictment charged that the balance of what was called "notes payable" was a false statement. *Id.* at 35a-37a.

The indictment therefore in most instances was limited and very specific in that certain liabilities, not defendant's total liabilities, were said to be understated and, therefore, false and misleading.

The conviction on Counts 2 and 3 was based on a jury chart states that the Champion Federal loans "were unsecured." App., *infra*, at 38a-39a. No one was called from Champion Federal to state such a conclusion. The Agent did not know that the Defendant had provided an assignment of the beneficial interest of his real estate to secure existing and future obligations owed to Champion. App., *infra* at 42a-43a. The chart and testimony does not summarize the record (since there was on testimony to support the

conclusion); and indeed is contrary to the documentary evidence. App., *infra,* at *Id.*

The defendant was convicted of understating his mortgages in an application or financial statement in June of 1989. (Counts 4, 5, 6) The indictment charged that the defendant had understated his mortgages. App., *infra,* at 35a-37a. The financial statement listed his "mortgage" accurately at approximately $390,000. The summary witness agrees with that number. The witness added $80,000 to the exhibit increasing "mortgages" to $460,000. The summary witness "concluded" on his own that the Champion ABI was a "mortgage". The documents of record do not show an $80,000 mortgage.

However, the summary charts were hardly limited to such "undisputed" calculations or arithmetic tabulations of defendant's loan balances. Charts 4, 5 and 6 summarize mortgages. App., *infra,* at 45a-50a. Not one witness in the case testified in support of the conclusions reached by the summary witness. The summary witness with no record support added to the list of mortgages a loan secured by an assignment of the beneficial interest in a land trust at Champion Federal. No witness from Champion ever testified at trial; no party to the transaction testified that this loan was a mortgage.

In Charts 2 and 3, the summary witness treated as an "unsecured" transaction obligations which were in fact secured by the assignment of the beneficial interest in the land trust - again, at Champion Federal - as of that date (a financial statement dated October 1988). There is no testimony of record to support the conclusion that defendant's $8,000 Champion loan was "unsecured," as testified to by Agent Sebo. App., *infra,* at 42a-43a.

In Counts VII and VIII, the summary witness identified a category called "notes payable," because Counts VII and VIII charge that certain loans ($150,000) were not disclosed under the caption "notes payable." App., *infra*, at 33a-35a. Every mortgage has connected with it a "note payable." There was no testimony of record to support the determination made by the agent that the notes payable should be separately listed under a category called "notes payable" when the financial statement listed the very same obligations as part of mortgages.

Defendant maintains his claim of prejudice based on the district court's erroneous admission of the Government's "summary" charts. The charts were argumentative versions of the evidence which resolved disputes between certain documents and testimony in favor of the Government.

2. The Jury Instruction Permitting A Finding Of Guilty For Conduct Not Charged

Defendant objected to Government Proposed Instruction No. 18, which quoted part of 18 U.S.C. § 1014 as follows:

> Whoever knowingly makes <u>any false statement</u> for the purpose of influencing <u>in any way</u> the action of . . . any financial institution the accounts of which are [federally] insured . . . upon any application or loan,

Gov't Instr. No. 18 (underlined added). App., *infra*, 70a-71a. Defendant objected to this instruction because it invited a guilty verdict based on "any false statement" for the purpose of influencing a bank "in any way", rather than solely upon a finding that the statements charged in the indictment were false and for the purpose of influencing the bank in "issuing, approving, or renewing" a loan. (Tr. at 1230; 1232-34.)

The Superseding Indictment was very specific in its charges. Defendant met those specific charges with substantial evidence.

In place of a single instruction, defendant offered sixteen separate instructions tailored to each of the specific offenses charged in the indictment. The district court overruled defendant's objections to the Government's proposed single instruction and refused to give defendant's separate instructions. (See Tr. at 1336-37; 1492; 1564-65.). The district court's error in instructing the jury deprived defendant of his right to be tried only on charges returned by a grand jury, and his right to receive a fair trial.

The Government seized on this error and urged the jury to find the Defendant guilty for alleged falsehoods other than those charged -- such as failing to report total liabilities or assets.

> Why didn't he leave it in the best light that you can give his tail? Why did he leave it vague and ambiguous and confusing. If he really was giving full disclosure, why?
>
> Well, it just clear. Even with his theory, the fact of the matter, folks, is that he didn't disclose all of his liabilities anyway. So even when he was talking about something is net or netted, he still didn't tell the full truth about his liabilities.
>
> * * *
>
> Incomplete doesn't mean truthful. Incomplete doesn't mean full disclosure. Incomplete means what? I didn't tell the truth. I didn't list all my assets and I should.

Tr. at 1490 & 1492.

Additionally, during final arguments the Government invited the jury to convict defendant of violating Section 1014 by falsely misstating his assets, even though this was never charged in the Superseding Indictment. (Tr. at 1547; 1558).

3. The Trial Court Did Not Perform A "Gate-Keeping" Role

The district court initially ruled that only "undisputed" facts or "balances" could be summarized because the witness was not an expert. The Government advised the district court "that The Agent is a summary witness. He's not testifying to independent recollection of what the witnesses are testifying. He is summarizing the documents . . . His summary charts reflect what the Defendant's loan balances were at the particular times." (Tr. at 56-57).

Further, the Government stated: "He is not an expert witness. He's summarizing information on documents . . . These are documents that are going to be in evidence. And this is a manner of publishing voluminous documents to the jury; it's absolutely appropriate under the rules". (Tr. 59) The Court ultimately gave the Defendant a standing object to this testimony. (Tr. 725)

The district court made the following rulings (which are paraphrased here) regarding the testimony of Agent Sebo:

> THE COURT: the only kind of expert who could decide if something is an unsecured loan is either somebody, I guess, perhaps in banking or an expert in UCC law. (Tr. 510)
>
> THE COURT: My understanding was that he was just going to summarize the loans. If he starts testifying as to what is secured or what is

> unsecured, then it seems to me that he is going beyond what he can do and he is starting to comment on the testimony in ways that I don't think that he can do. (Tr. 606)
>
> THE COURT: I agree that I don't expert him to get up there and try to substitute his opinion for, you know, what the jury has to decide. (Tr. 480)
>
> If he just goes over what the evidence was that these were the loans, these were the balances. The rest has to come in some other way." (Tr. 642)
>
> THE COURT: I think all this witness can testify to is what is really essentially undisputed ... which is what the balance of the loans ... were. (Tr. 643)

See App., *infra*, at 72a-76a.

The Agent, nonetheless, included in the chart disputed facts, opinions and summarized "facts" not of record. The trial court did not examine the charts and verify that the facts were in the record; and did not exclude the opinions of the witness contained in the charts.

The district court denied defendant's motions for mistrial following the introduction of Government Charts 1-16, Tr. at 629; the trial court denied similar motions at the end of the Agent's testimony. Tr. at 833-44. The district court further denied defendant's Fed. R. Crim. P. 33 motions for a new trial, which was based in large part on the admission of evidence.

4. The Government Summarized The Case By Having An Agent Prepare Summary Exhibits Which Include Conclusions With No Record Support

The easiest example to illustrate the indictment and the improper use of summary charts to prove the indictment is the treatment of the word "mortgage." The defendant was convicted of three counts (Counts 4, 5 and 6) because of a disagreement over whether an assignment of the beneficial interest in a land trust is the same thing as a mortgage. In each of those counts, the Petitioner accurately listed his mortgage debt. In support of the charge that "mortgages" were understated and false, the Government's summary witness prepared a chart which listed the actual mortgage and then added an $80,000 obligation at Champion Federal as a mortgage where the record shows that this obligation has in fact an assignment. The doctrine of judicial notice would establish as a fact that the law in the Seventh Circuit is that an assignment of the beneficial interest in property is totally different from a mortgage. *See West Suburban Bank of Darien v. Badger Mut. Ins. Co.*, 947 F. Supp. 333, 335 (N.D. Ill. 1996) (Bucklo, J.); *In re Romano*, 426 F. Supp. 1123, 1128 (N.D. Ill. 1977) (Flaum, J.) *modified*, 618 F.2d 109 (7th Cir. 1980). Over Petitioner's objection, the issue nonetheless went to the jury and the defendant was found guilty of Counts 4, 5, and 6 by falsely stating his "mortgages", because this "assignment" was not listed as a "mortgage." The Government summary, under Rule 1006, was not a summary of record evidence or facts. It was an opinion of the agent who was not an expert. The Government offered no other expert or testimony on this issue.

Counts 2 and 3 charged Petitioner with understating the line on the financial statement that listed "unsecured debts". The financial statement also used a line for assets with a "net" value. The summary chart used only the "liability" side of the financial statement. The financial statement lists as an asset securities with a "net" value of $72,000. App., *infra*, at 40a. The actual value was

$300,000. The summary witness testified that he did not consider the fact that the assets were stated to have a "net" value, *i.e.*, the equity in the securities, and further testified that he does not know what that expression means. App., *infra*, at 44a. What the Agent did in order to support the indictment was to list as liabilities the loans which caused the market value to be reduced to a net value. The summary witness therefore: (a) did not accurately summarize Petitioner's financial statement and (b) concluded that the "net" value figure should be ignored. The Court of Appeals has held that such a decision ignoring the use of "net" value is "nonsense". *United States v. Staniforth*, 971 F.2d 1355, 1357 (7th Cir. 1992)

The Boulevard Bank loans were also part of this financial statement and were treated as "unsecured". The Government summary witness ignored the fact that these loans were covered by a continuing lien. The lien is of record. Mr. Ruff, the Boulevard loan officer, testified that the lien was in existence at all times. (Tr. at 312; 317) App., *infra*, at 43a-44a. The bank (internally) nonetheless had a document which, for certain loans, said they were "unsecured." The testimony of Mr. Ruff, therefore, presents both sides of the same issue. It is a credibility question as to which version of Mr. Ruff's testimony the jury should believe. The Agent's "summary" chart resolved that conflict in favor of the Government and placed the Government's imprimatur on the status of defendant's loans with Boulevard Bank.

In Counts 7 and 8, the charge was that Petitioner's "notes payable" were understated; Petitioner treated certain loans as "tied" to a mortgage and therefore disclosed those loans as part of "mortgages." The summary was not based on any foundation testimony.

The chart of the agent "concluded" that certain liabilities in the financial statement should be "rearranged"; this did not effect the overall value or net worth on the financial statement; but added to the "notes payable" line on the financial statement; thereby supporting the indictment charge that the "notes payable" total was understated and false. App., *infra*, at 61a-65a.

B. Proceedings In the District Court

On September 3, 1996, the Special Grand Jury returned a Superseding Indictment charging defendant with 16 counts of violating 18 U.S.C. § 1014. Jury selection began on October 1, 1996. During the Government's case-in-chief, the jury heard testimony from 16 witnesses, including FBI Special Agent Gary Sebo -- who was the Government's chief witness.

Following the conclusion of the Government's case, defendant promptly moved for a judgment of acquittal under Fed. R. Crim. P. 29, (Tr. at 854), which was denied in part and the remainder taken under advisement.

The defense then called nine witnesses, including the defendant and an expert accountant, Marvin Levy. Character witnesses testified as to defendant's reputation for honesty and integrity. The Government called two witnesses in rebuttal. The evidence in the case closed on October 9, 1997.

The jury returned its verdict on October 16, 1997, finding defendant guilty on Counts 1-8 and 12-16 and not guilty on Counts 9-11 of the Superseding Indictment. The district court immediately entered judgment on the jury's verdict and, also on October 16, 1996, ordered the defendant to file his post-trial motions by November 15, 1996.

On November 15, 1996, Defendant filed a motion for judgment of acquittal and/or motion for new trial with a supporting brief and a two-volume appendix. In one sentence, set forth in a Minute Order dated February 11, 1997, the district court denied defendant's post-trial motions. App., *infra*, at 27a.

On June 20, 1997, the district court rejected most of defendant's arguments relating to Sentencing Guidelines issues and determined defendant's offense level to be 17. (06/20/97 Tr. at 175) The district court also denied defendant's departure motion from the Sentencing Guidelines.

The district court sentenced defendant to 24 months in prison, fined him $6,000.00, and assessed costs in the amount of $650.00. The defendant filed his Notice of Appeal on June 24, 1997.

C. Proceedings in the Court of Appeals

In its opinion, the Court of Appeals unanimously affirmed petitioner's convictions and sentence. With respect to petitioner's claim that his Fifth Amendment rights had been violated at trial, the court of appeals rejected petitioner's constitutional argument. However, the court of appeals' opinion did not address petitioner's basic argument, *i.e.*, that based on the evidence introduced at trial and the government's closing argument, the jury could have convicted petitioner of violating 18 U.S.C. § 1014 by making false statements to banks which were different from the alleged false statements actually and specifically charged in the superseding indictment. Instead, the court of appeals appears to have focused on whether the jury could have found petitioner guilty of committing an offense other than that prohibited by Section 1014. App., *infra*, at 22a-23a. The court of appeals' misapprehension of the Fifth Amendment issue is inexplicable.

Petitioner's argument that the district court erred in admitting the purported "summary" testimony of the FBI Special Agent was summarily disposed of by the Court of Appeals which held that the agent -- a non-expert -- "acted within the appropriate parameters of a summary witness by testifying simply as to what the government's evidence showed." App., *infra*, 15a. The government did represent to the district court that the Agent would not state conclusions or opinions and simply list uncontested loan amounts and balances. App., *infra*, at 15a; 72a-73a. The evidence, admitted over objection, was contrary to such representations; that is precisely what he did -- over petitioner's strenuous objection. The district court did not "check" the foundation for the charts.

Petitioner subsequently filed a petition for rehearing, which the Court of Appeals denied on February 2, 1999.

REASONS FOR GRANTING THE WRIT

I. THE CASE WAS SUBMITTED TO THE JURY IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHT TO LIMIT CRIMINAL RESPONSIBILITY TO THE GRAND JURY CHARGE

The Supreme Court has not addressed the issue of a Defendant's Fifth Amendment right to be tried only on those charges returned by the grand jury in many years. The definitive case is *Stirone v. United States*, 361 U.S. 212 (1960). The Defendant respectfully suggests that this case is on all fours with *Stirone* and that the Supreme Court ought to exercise its supervisory authority over the Constitution, reverse the lower courts and reaffirm the Fifth Amendment's grand jury guarantee that a defendant must be put on notice as to the charges for which he will be tried so that a meaningful defense can be developed.

A substantial injustice has been done in this case. Petitioner filed financial statements with banks to procure loans. The indictment did not charge that the petitioner misstated his "net worth" or failed to disclose "all" liabilities. Rather, the indictment charged that particular categories of loans were understated. As an example, several counts charged the petitioner with not stating all of his "notes payable." Another count in the indictment charged that a particular line in petitioner's financial statement called "unsecured debt" was not accurately stated. In the context of such a narrow and limited indictment, substantial issues were raised as to what constitutes an "unsecured debt" if, for example, a land trust is involved; or whether notes payable includes (or excludes) obligations stated on another line of the financial statement where "mortgages" are listed. The government called no witness who was offered as an expert to explain the various terms used in the indictment, a fact which did not trouble the court of appeals in this case. App., *infra,* 12a.

The financial statements in this case included many "representations." Several of the items in the financial statements included the phrase "net," meaning that an asset had a net value which the jury understood to mean a value after some liability had reduced the gross value to a net value.

It is in this context that the petitioner complains about the jury instruction -- and prosecution argument -- approved by the District Court and the Court of Appeals. The jury was instructed that "any false statement" made for the purpose of influencing "in any way" the financial institution violates 18 U.S.C. § 1014. The petitioner testified at trial that the government's case was simply wrong; that the item "notes payable" did not include certain of his liabilities because they were disclosed under another column in

the statement, i.e. mortgages. It is obvious that this testimony had considerable credibility because the government in its final argument argued that any failure by petitioner to disclose any liability would support a conviction. That argument, however, bore no relation to the charges in the indictment. This argument was "permitted" because of the improper jury instruction which advised the jury that the law was violated if a defendant knowingly made "any false statement" for the purpose of influencing "in any way" a federally-insured financial institution.

The Government acted on this error and urged the jury to find the petitioner guilty for alleged falsehoods other than those charged in the superseding indictment -- such as failing to report total liabilities or assets.

> Why didn't he leave it in the best light that you can give his tail (*sic*)? Why did he leave it vague and ambiguous and confusing. If he really was giving full disclosure, why?
>
> Well, it just clear. Even with his theory, the fact of the matter, folks, is that he didn't disclose all of his liabilities anyway. So even when he was talking about something is net or netted, he still didn't tell the full truth about his liabilities.
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> * * *
>
> Incomplete doesn't mean truthful. Incomplete doesn't mean full disclosure. Incomplete means what? I didn't tell the truth. I didn't list all my assets and I should.

Tr. at 1490 & 1492. (emphasis added).

Petitioner was never indicted for failing to disclose "all his liabilities" and the conviction violates fundamental principles of fairness. The Court of Appeals' treatment of

this issue is simply wrong and a great injustice has been done. Instruction 19 did not cure the issue at all. Instruction 19 accurately states that the government must prove that a "false statement to a bank was knowingly made." What false statement? The jury was instructed that "any false statement" will support the conviction. Petitioner promptly and properly objected to this instruction and tendered specific instructions relating to the detailed and specific offense charged by the grand jury. Petitioner's objections were overruled; petitioner's tendered jury instructions were denied.

We suggest that the Supreme Court has repeatedly stated a proposition fundamental to criminal law. In *Stirone v. United States*, 361 U.S. 212 (1960), the Court reversed a conviction because the contentions made by the prosecution in that case included a criminal liability theory which was not charged in the indictment. The Court stated that "when only one particular kind of commerce is charged, a conviction must rest on that charge and not another even though it be assumed that under an indictment drawn in *general terms*, a conviction might rest upon a showing that commerce of one kind or another had been burdened." 361 U.S. at 218. In this case, as in *Stirone*, the grand jury could have charged (in the counts in which petitioner was convicted) that "total liabilities" or "net worth" were falsely stated -- in effect, a general charge; but that is not what the grand jury did. Rather, as in *Stirone*, discreet charges were made. The jury instruction plainly misstated the law and the prosecution argued improperly that a misstatement of "total liabilities" would sustain a conviction even though the superseding indictment did not charge any such violation on those counts in which petitioner was convicted.

The Court in recent years has reaffirmed the bedrock proposition set forth in *Stirone*. In *Schmuck v. United States*, 489 U.S. 705 (1989), the Court declared that, "[i]t is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." 489 U.S. at 717 (citations omitted).

Further, the Court stated the basis of this doctrine: It "is based at least in part on the right of the defendant to notice of the charge brought against him." *Schmuck*, 489 U.S. at 718 (citation omitted).

In this case, petitioner defended the charge that was noticed, i.e., in the several counts that limited the charge to one line of his financial statement, e.g., "notes payable." The defendant was not charged and was given no notice as to such a count that fraud had occurred in the failure to disclose "all of his liabilities." Further, the defendant was not given notice that he should defend in this case every statement or line submitted on the financial statement and the Court's instruction to the jury that a conviction could be based upon "any misstatement made by the defendant" was plainly in error and plainly amended the grand jury's superseding indictment.

The Supreme Court also considered the application of *Stirone* in *United States v. Miller*, 471 U.S. 130 (1985). In *Miller*, the Court reaffirmed the law stated in *Stirone* where the trial evidence "broadened" the basis of the defendant's potential criminal liability from the grand jury charge. The Supreme Court observed that in *Stirone* the trial "had 'amended' the indictment by *broadening* the possible basis for conviction from that which appeared in the indictment." 471 U.S. at 138 (emphasis in original). The Court went on to hold that Miller's conviction on the other hand was not tainted and did not violate the guarantee un-

der the Fifth Amendment because that indictment "clearly set out the offense"; the Fifth Amendment was not violated when "the indictment charged more than was necessary." *Id.* at 140.

The *Miller* decision, reaffirming *Stirone*, applies to this case. Petitioner's indictment was "broadened" by the jury instruction and the prosecution's argument in violation of the grand jury clause of the Fifth Amendment.

II. THE ADMISSIBILITY OF SUMMARY EXHIBITS, PREPARED BY GOVERNMENT AGENTS IN CRIMINAL CASES, SHOULD BE BASED ON UNIFORM RULES WITH THE DISTRICT COURT PERFORMING A "GATE KEEPING" ROLE

We have found no Supreme Court case which reviews the metes and bounds and appropriateness of the government's common practice of using an FBI agent or an IRS agent to "summarize" the government's trial evidence in a criminal case. This issue involves discretionary calls by the trial court on a host of related evidentiary issues: Is the agent an expert in the field of his testimony?; Is the agent summarizing all the evidence or part of the evidence?; Is the agent invading the jury's province by determining credibility or selecting what should be included in the summary?; Is the supposed "summary" a simple collection of data or uncontested facts?

The practice of using such a summary agent witness by the prosecution has been reviewed in many decisions of the Courts of Appeals. Nonetheless, we suggest that this area needs clarification. The decisions of the various Courts of Appeals appear to be in conflict and different conclusions or holdings result from different analyses of the law.

We note that the Supreme Court in recent years has taken two important civil cases involving expert witnesses and through those cases, has provided guidance to the trial courts on how expert opinion testimony should be presented and controlled by the District Courts. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, __ U.S. __, 119 S.Ct. 1167 (1999).

We suggest that there is an equally if not more important need for the Supreme Court to use this case as an opportunity to clarify the law relating to the use of expert summary government agent witnesses in criminal cases.

In this Court's recent review of a civil trial in *Kumho Tire*, the Court extended the *Daubert* rule to all experts -- not just scientists. The trial court therefore has a "gate-keeping" obligation, including the tasks of "ensuring that an expert's testimony ... rests on a reliable foundation" ... *Kumho Tire Co.*, 119 S. Ct. at ___.

There is no uniform treatment of the admissibility of "agent summaries" in the various Courts of Appeals. The Ninth Circuit has a procedure similar to the *Kumho* and *Daubert* rule that treats the trial court as a "gate-keeper."

The Ninth Circuit uses the following procedure:

First. Out of the presence of the jury, the District Court analyzes the charts to make sure that all of the evidence is of record.

Second. The charts are to be used only as a "testimonial aid." It is not admitted as evidence. It can be used in final argument. *See United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984).

There is no such procedure in the Seventh Circuit. In this case, the trial court did not review the charts to deter-

mine whether they included data in evidence. Indeed, the record shows that a substantial portion of the charts represents data or information that is not of record, *e.g.*, as above noted listing an assignment as a mortgage. Further, there is a conflict in the circuits: in the Seventh, Sixth and Fourth Circuits, the charts are introduced into evidence and are not limited to a testimonial aid; in the Ninth Circuit the "summary" is not introduced in evidence and is a "testimonial aid".

The record in this case is an example of the problem where a district court does not perform its "gate-keeper" function and the confusion in the lower courts over the procedures to be used in determining admissibility of "summary testimony."

The "gate-keeping" role was not used in this case. Petitioner was convicted through a series of summary charts that are not supported in the record and include improper opinions or conclusions of a non-expert FBI agent.

"Net" Assets (Counts II and III)

The facts supporting the conviction in Counts II and II are entirely based upon the Agent's charts. G.Ex. Charts 2, 3. App., *infra*, at 38a-39a. Counts II and III charged that the defendant's "unsecured debt" was understated. However, although certain liabilities were not specifically listed, they were disclosed. They were not listed because the defendant owned *$300,000 of securities*, but listed this asset at a "net" figure of $72,000. App., *infra* at 40a-41a. The liabilities which reduced the asset to a net value, therefore, were not specifically listed. Nevertheless, the statement as a whole was accurate. The summary simply ignored the key line on the statement and listed as undisclosed unsecured, debt items that were included in the line "rejected" by the agent.

Mortgages (Counts IV, V and VI)

In June of 1989, the defendant listed his mortgage as $398,000. The Government charged that this was false in that the "real estate mortgages total $476,816." App., *infra,* at 45a. No witness of the Government testified to that conclusion -- except the Agent. The facts are undisputed. The defendant did have $398,000 in mortgage and also had assigned the beneficial interest in a land trust to Champion Federal as security for an $80,000 loan. The Government argued that an assignment of the beneficial interest is the same thing as a real estate mortgage. The district court submitted the issue to the jury despite the fact that the law in the Northern District of Illinois is that an assignment of a beneficial interest in a land trust is not a mortgage.

"Notes Payable" Disclosed As A Mortgage (Counts VII and VIII)

As to Counts VII and VIII, the defendant prepared a financial statement dated March 1, 1990. App., *infra,* at 59a-60a. When that financial statement was prepared, the defendant stated that he had notes payable in the amount of $105,000. The indictment charged (for that time period) that roughly an additional $150,000 should also have been listed as "notes payable". App., *infra,* at 56a-57a. The facts are not in dispute. The defendant was not charged with filing a false financial statement. The defendant was charged with simply understating this one line: "notes payable". However, instead of a $390,000 mortgage as previously reported, defendant added the $150,000 to the mortgage line *and actually disclosed $540,000 of mortgages.* What the summary did was to "re-arrange" the debt listing $150,000 of debt as a "Note Payable" instead of a "mortgage". The agent's "summary" was a selective evaluation of the evidence ending is a "re-arrangement" of

the listed debts to support the specific charge of the Grand Jury.

The agent witness in this case accepted certain testimony and rejected other testimony. In effect, telling the jury which witness should be believed, *i.e.*, who was more credible. The various Courts of Appeals disagree about how such a witness should testify. The Seventh Circuit in *United States v. Benson*, 941 F.2d 598 (7th Cir. 1991), stated that the government agent who relied on certain witnesses whose credibility was at issue necessarily made a selection of what testimony to use, the agent "had to make credibility determinations" which the Seventh Circuit says is not "a proper subject." 941 F.2d at 604. Further, that this discretion to select some testimony and reject others puts a "stamp of approval" on a particular witness. The Seventh Circuit cites *United States v. Azure*, 801 F.2d 336, 339-41 (8th Cir. 1986) and *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981). Those decisions support the Seventh Circuit's opinion in *Benson*.

These decisions directly conflict with the approach taken by the Fifth Circuit in *United States v. Moore*, 997 F.2d 55 (5th Cir. 1993). There, the argument was raised that the agent simply repeated favorable testimony and implicitly therefore determined credibility (a jury issue). The Fifth Circuit takes the position that the summary is improper only if the agent makes a declarative statement "that he believed the government's witnesses." In so holding, the Fifth Circuit reaffirmed it's rule that prohibits such testimony only if "an express statement" is made by the witness "that he believed the government's witnesses." 997 F.2d at 59.

In short, in some circuits, the testimony of the summary agent witness relying on certain witnesses who are in conflict with other witnesses is improper because it neces-

sarily requires a determination of who to be believed and therefore through the agent emphasizes such a witness' testimony. On the other hand, in other circuits, the testimony is not to be excluded unless the witness expressly states that he decided to "believe" a certain witness.

The summaries prepared under F.R.E. 1006 in this case did not include all of the evidence. The difficulties of trial courts in attempting to resolve this issue is highlighted by the opinion in this case. In one approach in *United States v. Radseck*, 718 F.2d 233, 239 (7th Cir. 1983), the Seventh Circuit held that the summaries do not have to include all the evidence. The "summary" can include only a version of the facts that supports the government's case, if an "expert" is used.

On the other hand, the Seventh Circuit, in *United States v. Benson*, held that an expert cannot summarize the testimony and determine which evidence should be believed -- issues that "the jury was equally qualified to make."

The Courts of Appeals are in conflict regarding when a non-expert government agent witness is permitted to "summarize" and what testimony is permitted. In this case, the agent was not an expert but nonetheless stated ultimate factual and legal conclusions that are not of record -- except through the agent's testimony. The Court of Appeals in this case affirmed petitioner's conviction on the theory that a non-expert can state "conclusions" as part of a "summary." App., *infra* at p. 15a. The agent "concluded" (to use the Court's words) that an assignment of a beneficial interest constitutes a mortgage. The agent determined that the transaction should be treated as a mortgage and this established a fraud because the item on the financial statement called "mortgages" did not include this "assignment."

Various circuit courts have approached the admissibility of summaries based on different evidentiary rules. The Seventh Circuit in this case regarded the summaries prepared by the witness as admissible under F.R.E. 1006. The problem in this case as above considered includes the difficulty of treating (as a 1006 summary) opinions of the witness and opinions of other witnesses. The Seventh Circuit in *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985), treated the matter by saying that even if the summary is not technically a F.R.E. 1006 summary, it nonetheless should be admitted into evidence as a "pedagogical device."

> "The trial court nevertheless has discretion to permit the government to use it (the summary) as a 'pedagogical device' [ ] to summarize or organize testimony or documents which have themselves been admitted in evidence."

Howard, 774 F.2d at 844 n.4 (citation omitted).

The problem in this case is that the trial court did not verify that the support for the "summary" was at times not of record. In this case the summaries were admitted over objection even though the evidence was not of record.

The Sixth Circuit uses a different approach to analyze the admissibility of charts or summaries. "Summaries" that are not strictly F.R.E. 1006 summaries are "more akin to argument than evidence since they organize the jury's examination of testimony and documents already admitted in evidence. Thus, strictly speaking, they do not fall within the purview of Rule 1006." *United States v. Paulino*, 935 F.2d 739, 753 (6th Cir. 1991). The Court in *Paulino* went on to justify the admissibility of these summaries under Rule 611(a) at the Federal Rules of Evidence. With such a rule, the Court, for purposes of exercising "reasonable con-

trol over the trial," could admit anything. In any event, the Sixth Circuit appears to approach admissibility of an agent's summary under a different justification than used by the Seventh Circuit.

The Fourth Circuit appears to permit expert summaries under either F.R.E. 702 or F.R.E. 611(a), but with great caution:

> "We stress that in the ordinary federal drug prosecution, neither a summary witness's testimony nor a summary chart of the sort discussed here would be admissible pursuant to Rules 702 or 611(a). In such cases, the use of summaries -- be it through narrative or charts -- is best saved for the prosecutor's closing argument. The dangers inherent in using a summary witness in a federal criminal prosecution to support the government's case-in-chief are plain and are only exacerbated in circumstances such as are present in the case where the witness was also testifying in the role of a expert. The dual role of expert and summary witness often lends to the credibility of earlier government witnesses and adds to any possible confusion that the jury might face in attempting to weigh the evidence presented."

United States v. Johnson, 54 F.3d 1150, 1162 (4th Cir. 1995)

This is a particularly good case to resolve the procedure to be used in controlling the admissibility of summary charts used in criminal cases.

(a) The agent in this case did not list or summarize voluminous data under Rule 1006. The rules for

a non-expert summary witness should not include "conclusions" or opinions by the agent.

(b) The opinion below confuses the role of an expert with the role of a non-expert: The court relied on the *Radseck* case in which an expert was used. The opinion is intentionally inconsistent: a 1006 summary by a non-expert that includes conclusions or opinions cannot be justified by treating the witness as an expert.

(c) The agent in this case -- again not an expert -- evaluated testimony: an issue that is subject to a variety of conflicting views: Under *Benson*, such a "summary" is improper. Under *Radseck* a summary -- selectively summarizing just some facts -- is acceptable, if the witness is an expert. On the other hand, the opinion is "admissible" (in the Fifth Circuit) as long as the expert doesn't "expressly" state that a particular witness is to be believed.

(d) The procedure used in this case highlights the need to have the rules of the Ninth Circuit applied to all circuits.

(i) The Court in this case stated that only uncontested facts could be used in the summary; but did not review the summary and denied defendant's motions that the exhibit included "contested" facts and facts not of record;

(ii) The summary was nonetheless admitted in evidence and not used as a "testimonial aid."

(e) In short, the rules that control admissibility are not uniformly applied -- it depends on the Circuit; four different "rules" are used:

(i) Rule 1006 summaries, which require an accurate statement of data or facts of record;

(ii) An expert "summary" of testimony or data under Rules 702-5;

(iii) A summary admitted under Rule 611 -- based on the "control of the trial procedures";

(iv) A summary based on no rule at all except the need for a "pedagogical device."

The court should take this case and settle the rules that should be applied. We suggest further that, as in *Daubert* and *Kumho,* the court hold that district courts should be required to perform a "gate-keeper" role and adopt the procedure used in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 1999.

In the
United States Court of Appeals
for the Seventh Circuit

No. 97-2702
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRECK M. SWANQUIST,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CR 207—**Elaine E. Bucklo,** *Judge.*

ARGUED JANUARY 8, 1998—
DECIDED NOVEMBER 27, 1998

Before CUMMINGS, COFFEY, and RIPPLE, *Circuit Judges.*

COFFEY, *Circuit Judge.* A jury convicted Breck Swanquist of thirteen counts of making false statements to federally-insured financial institutions in violation of 18

U.S.C. § 1014. More specifically, the jury found that between 1988 and 1991, Swanquist repeatedly submitted incomplete personal financial statements and loan applications to various Illinois banks and concealed or under-reported certain debts to facilitate his receiving or renewing loans from these financial institutions. The district court sentenced Swanquist to concurrent 24-month terms of imprisonment and imposed a $6000 fine. Swanquist appeals, arguing that the evidence was insufficient to convict him and that the district court made numerous errors, including admitting in evidence the government's summary testimony and charts; restricting his expert witness's testimony; refusing to charge the jury on his "net worth" defensive theory or to give a separate elements-of-the-offense instruction for each § 1014 count; incorrectly calculating for sentencing purposes the amount of loss caused by his fraudulent actions; and incorrectly adjusting his sentence upwards by two points for obstruction of justice. We affirm.

I. BACKGROUND

On February 29, 1988, Swanquist, the President and Chief Executive Officer of Gary Wheaton Bank of Fox Valley, Illinois (a subsidiary bank of First Chicago Corporation), filled out an application for a home mortgage loan. On the portion of the application entitled "Liabilities and Pledged Assets," Swanquist disclosed that he had four outstanding bank loans totaling $383,450. He did not disclose, however, eleven other loans from six financial institutions equaling almost $400,000. In April of 1988, Swanquist submitted the application to Midwest Mortgage Services, an underwriter evaluating his request for a residential loan from NBD Bank of Evanston.

In October of 1988, Swanquist tendered a self-created personal financial statement, dated October 1,

1988, to Citizens National Bank to borrow money for a new Porsche. Swanquist submitted the same financial statement to Boulevard Bank on April 3, 1989 to assure continued approval of three outstanding loans totaling $47,000. At the time he submitted the statement to Citizens National Bank, Swanquist had unsecured bank loans totaling approximately $188,000, although his statement represented the amount to be only $19,000. When Swanquist resubmitted the same financial statement to Boulevard Bank six months later, his outstanding bank loans totaled approximately $189,000.

In June of 1989, Swanquist tendered another self-created personal financial statement, dated June 1, 1989, to two banks: First National Bank of Des Plaines, which then renewed an outstanding $40,000 loan; and Merchants National Bank of Aurora, where Swanquist successfully obtained two new loans totaling $58,000, a $75,000 line of credit, and renewal of an outstanding $87,359 loan. The financial statement represented that Swanquist had real estate mortgages equaling $398,000, auto loans equaling $45,000, and unsecured debt equaling $16,000. At the time he submitted the statement to the two banks, however, Swanquist actually had real estate mortgages equaling approximately $477,000, auto loans equaling approximately $57,000, and unsecured debt equaling approximately $185,000—amounting to a total discrepancy of approximately $260,000. Swanquist submitted the same financial statement to Boulevard Bank on January 30, 1990, when he again sought continuing approval of the three outstanding loans that now totaled $46,000. As of this date, Swanquist had amassed real estate mortgages totaling approximately $551,000, auto loans totaling approximately $102,000, and unsecured bank debt totaling approximately $248,000. Thus, by the time Swanquist submitted the June 1, 1989 financial statement

to Boulevard Bank, his outstanding debt in these three categories surpassed the amounts disclosed on the financial statement by approximately $442,000.

On April 20, 1990, Swanquist tendered a self-created personal financial statement, dated March 1, 1990, to Mid America Federal Savings Bank when he applied for two short-term unsecured loans, each in the amount of $35,000, to purchase polo ponies. On this statement, Swanquist claimed that he had outstanding notes payable in the amount of $105,000. In truth, on the date he submitted the financial statement, he had notes payable totaling approximately $269,000. In August of 1990, Swanquist submitted the same financial statement to Aurora National Bank to obtain two short-term unsecured loans totaling $18,000. As of this date, Swanquist had outstanding notes payable totaling approximately $337,000.

In September of 1990, Swanquist tendered a self-created personal financial statement, dated August 31, 1990, to Merchants National Bank. On this statement, Swanquist disclosed outstanding loans in the amount of $902,000 when in fact his actual loans totaled approximately $1,006,000.

In November of 1990, Swanquist applied for a home mortgage loan with First Midwest Bank, and on this occasion he submitted a self-created personal financial statement signed on November 15, 1990 (but dated December 10, 1990), in which he disclosed that he had truck and trailer loans in the amount of $35,000, and notes payable in the amount of $189,000. As of December 10, 1990, however, Swanquist actually had approximately $47,000 in truck and trailer loans, and approximately $502,000 in outstanding notes payable. Swanquist also submitted the same financial statement to First National Bank of Des Plaines in December of 1990.

In April of 1991, Swanquist submitted a mortgage application, dated March 23, 1991, to Midwest Mortgage Services while seeking approval for a home mortgage loan from Gary Wheaton Bank of Batavia. On the application, Swanquist stated that he had a real estate mortgage in the amount of $300,000, and three other loans totaling $87,700. As of April 1, 1991, however, Swanquist had outstanding loans in the approximate amount of $833,000, including nine bank loans and a family loan not disclosed on the financial statement.

Throughout 1991, Swanquist also tendered another self-created personal financial statement, this one dated January 31, 1991, to four different banks: (1) to Boulevard Bank on April 1 when he again sought continuing approval of three loans; (2) to Citizens National Bank sometime between February 10 and April 6 to renew an outstanding $10,000 loan; (3) to DuPage Valley State Bank in early June to borrow $14,000; and (4) to Firstar Park Forest Bank in August to borrow $18,000. The financial statement listed outstanding truck and trailer loans in the amount of $35,000, notes payable in the amount of $162,000, and one additional loan in the amount of $4,000. However, on the day Swanquist filled out the financial statement, he actually had approximately $47,000 in truck and trailer loans and approximately $542,000 in notes payable.

Meanwhile, beginning in the fall of 1990, the audit department of First Chicago Corporation began investigating Swanquist's debt load. Members of the audit department, including Timothy Boland and Tom Begg, procured copies of Swanquist's credit reports, set up a meeting with Swanquist to review his credit reports and loans, and then decided after the meeting to monitor Swanquist's financial load.

In November of 1991, the audit department again investigated Swanquist's financial circumstances and obtained current versions of Swanquist's credit reports, as well as his October 1991 Regulation O disclosure form, a federal form on which executive officers of financial institutions must disclose debts incurred at other financial institutions. The auditors compared the Regulation O form to Swanquist's Midwest Mortgage Services loan file, which contained the self-created personal financial statement that Swanquist had tendered with his March 1991 mortgage loan application. The comparison reflected a number of loans listed on the Regulation O form which were not listed on the mortgage application. The discovery of this discrepancy led to another meeting with Swanquist. At this meeting, Boland and Begg asked Swanquist why certain portions of the Midwest Mortgage Services loan application form, such as the "total liabilities" and "net worth" columns, were left blank. Swanquist responded that the omissions were an "oversight." When Boland and Begg pointed out five bank loans disclosed on the Regulation O form that were not listed on the mortgage application, Swanquist again responded that these omissions were "oversights." Boland and Begg then asked Swanquist whether he had additional undisclosed debt, and Swanquist admitted that he also carried approximately $230,000 in family debt. The next day, James Carey, the head of First Chicago Corporation's internal audit department, met with Swanquist and asked for an explanation regarding the discrepancies. Swanquist responded to Carey's inquiry simply by stating that the mortgage application was "incomplete." Swanquist was asked to tender his resignation from Gary Wheaton Bank shortly thereafter.

In late 1991, First Chicago reported its discovery to the Federal Bureau of Investigation, who assigned the case to Gary Sebo, an FBI special agent. On March 27, 1996, a federal grand jury returned a seventeen-count indictment charging Swanquist with making false statements to federally-insured financial institutions to influence the approval, issuance, or renewal of loans in violation of § 1014. On September 3, 1996, the grand jury returned a sixteencount superseding indictment, each count of which corresponded, in chronological order, to a specific instance in which Swanquist submitted financial statements to a financial institution to influence the approval, issuance, or renewal of loans. Swanquist pleaded not guilty, and a jury trial commenced on October 2, 1996.

At trial, the government presented evidence demonstrating that between 1988 and 1991, Swanquist on a number of occasions submitted incomplete personal financial statements to banks, thereby concealing and under-reporting certain debts in order that he might receive or renew loans from numerous financial institutions. Bank officials from many of the involved banks, such as Gary Bogenberger, a vice president with First National Bank of Des Plaines, and Peter Dickes, a vice president with Merchants National Bank, testified that they expected applicants to inform them of all outstanding debts and that they knew of no practice permitting loan applicants to omit categories of debt. Bank officials also testified as to the nature of Swanquist's loans; for instance, whether a specific loan was secured or unsecured.

During its case in chief, the government called FBI Agent Sebo to summarize the government's evidence. Sixteen charts, one for each count of the superseding indictment, were presented to the jury through Agent Sebo. On the left-hand side of each chart, Agent Sebo, listed the

loans Swanquist actually disclosed on the relevant financial statement or loan application. On the right-hand side, Agent Sebo listed Swanquist's actual outstanding loans. From these charts, the jury could see the discrepancies between the information Swanquist supplied to the various banks and the actual state of his financial affairs at the time of disclosure.

Swanquist, testifying on his own behalf, stated that his financial statements and loan applications were not false because all of the allegedly undisclosed information was either disclosed elsewhere in the documents or was not required to be disclosed because only unsecured debts were to be listed and the unlisted loans were not unsecured. For instance, he testified that the October 1, 1988 financial statement submitted to Citizens National Bank and Boulevard Bank need not have disclosed an allegedly unsecured loan with Champion Bank because this loan actually was secured by an "assignment of beneficial interest" in his land trust. Nor, he said, was he required to list outstanding loans from National Bank of Des Plaines and Merchants National Bank because these loans were secured by stock, the value of which was included in the portion of the relevant statement entitled "marketable securities (net)." Similarly, Swanquist testified that two undisclosed loans with Boulevard Bank were secured by language in the loan documents granting the bank a lien on all of the Borrower's property "in the possession of or under the control of the bank." He also claimed that certain loans with First National Bank of Des Plaines and Merchants National Bank did not have to be disclosed on his June 1, 1989 financial statement because they were secured by negotiations with bank officials giving the banks a security interest in his house. As for an undisclosed $235,000 loan from his family, Swanquist testified that this loan was

"between family" and was not required to be listed on the Regulation O form.

Numerous government exhibits undermined Swanquist's testimony. As an example, although Swanquist testified that he did not disclose his $65,000 loan with the First National Bank of Des Plaines (reduced to $40,000 in 1989) on any of his applications or financial statements because it was secured, the First National loan documents indicate that the loan actually was unsecured. Similarly, although Swanquist claimed at trial that all of his loans with Boulevard Bank were secured by property within the bank's possession or control, the bank only possessed the title to one of Swanquist's cars, having an approximate worth of $15,000.

A jury found Swanquist guilty on thirteen of the sixteen counts, and the district court sentenced him to concurrent 24-month prison sentences on each count.

II. ISSUES

Swanquist advances seven arguments for consideration. Initially he contends that the evidence is insufficient to sustain his convictions; second, that the district court abused its discretion in admitting into evidence the government's summary testimony and charts and in restricting his cross-examination of the summary witness; third, that the court abused its discretion in limiting the testimony of his expert witness; fourth, that the court erroneously refused to charge the jury on his "net worth" defensive theory; fifth, that the court improperly refused to give a separate elements-of-the-offense instruction for each count of the superseding indictment; sixth, that the court incorrectly calculated for sentencing purposes the amount of loss caused by his fraudulent

actions; and seventh, that the court erred in increasing his base offense level by two points for obstruction of justice.

III. DISCUSSION

A. The Sufficiency of the Evidence

Initially Swanquist contends that the evidence is insufficient to sustain his § 1014 convictions.[1] His argument is twofold. First, although he discusses no particular count of the superseding indictment, or any of the evidence, Swanquist attacks generally his convictions, arguing that the government failed to disprove his testimony that, at the time he submitted the financial statements and applications, he believed his answers to be truthful based upon his own understanding about which categories of debts were required to be disclosed in the documents and which debts fell within each of these categories. Swanquist also broadly asserts that the government failed to establish the meanings or parameters of various categories of debt, e.g., "unsecured debt," "notes payable," and "real estate mortgages," or that his use and understanding of these categories on the various documents was contrary either to his trial testimony or to widely accepted interpretations of these terms within the banking industry.

We review the record and the evidence in the light most favorable to the government. *United States v. Draves*, 103 F.3d 1328, 1332 (7th Cir.), cert. denied, 117 S. Ct.

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[1] An individual violates 18 U.S.C. § 1014 when he "knowingly makes any false statement or report ... for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... upon any application[,] ... commitment, or loan . . . ." 18 U.S.C. § 1014.

2528 (1997). Pursuant to this deferential standard, "we will reverse only if there is no evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (citing United States v. Penson, 896 F.2d 1087, 1093 (7th Cir. 1990)). In conducting this inquiry, we are obliged to defer to the jury's reasonable inferences and to the weight it gave the evidence. *United States v. Magana*, 118 F.3d 1173, 1186 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1104 (1998); *United States v. Caudill*, 915 F.2d 294, 297 (7th Cir. 1990).

In this case, a number of witnesses testified regarding the nature of Swanquist's outstanding undisclosed loans. Lewis Ruff, an assistant vice president at Boulevard Bank during the relevant time period, testified that Swanquist had three unsecured loans with the bank. Gary Bogenberger and Ronald T. Larson, a consumer loan officer with First National Bank of Des Plaines, both testified that Swanquist's $65,000 loan with the bank was unsecured. Peter Dickes testified that Swanquist had a number of unsecured loans with Merchants National Bank, including an $18,000 loan and a $40,000 loan. Dickes also testified regarding a $144,000 unsecured loan that the bank renewed in July of 1990 following Swanquists agreement to provide the bank with a secondary mortgage on his home. Dickes explained that the bank sought collateral on the loan prior to renewal because it was worried that it was "not getting paid off on a large $144,000 unsecured loan, and the repayment programs were not falling in place, so we wanted some collateral to secure ourselves." Moreover, as mentioned previously, many bank officials testified that they expected applicants to inform them of all outstanding debts and that they knew of no practice permitting loan applicants to omit categories of debt. Based upon the totality of the evidence presented, the jury could rationally have concluded that Swanquist's trial testimony was

untruthful or false: that he knew the undisclosed loans were unsecured; that he should have disclosed all of his loans—both secured and unsecured—on the financial applications; and that he provided banks with false information for purposes of influencing the loan approval, renewal, or issuance procedure. The mere fact that the government did not see fit to educate the jury regarding the exact definitions of the various categories of debt does not undermine our confidence in the ability of the jury, based on the evidence before it, to understand the trial testimony and to find the essential elements of the crime beyond a reasonable doubt.

Swanquist's remaining contention concerning the sufficiency of the evidence is more focused. He maintains as to counts three, six, and thirteen of the superseding indictment, all of which involve Boulevard Bank, that the government never proved he submitted false statements to influence Boulevard Bank in approving, issuing, or renewing loans. According to Swanquist, the evidence merely established that the bank asked for financial statements simply to keep its loan files current, not to undertake any loan activity. Conviction on this proof, Swanquist maintains, effectuated a constructive amendment of the indictment.

After reviewing the record, we find no evidence of a constructive amendment. As this court stated in *United States v. Kuna*, 760 F.2d 813 (7th Cir. 1985):

> "[A] constructive amendment is found where a 'complex set of facts' is presented to the jury during the trial which is distinctly different from the set of facts set forth in the charging instrument. Alternatively, to find a constructive amendment the crime charged in the indictment must be 'materially different or

> substantially altered at trial, [so that] it is impossible to know whether the grand jury would have indicted for the crime actually proved.'"

Id. at 818 (*quoting United States v. Muelbl*, 739 F.2d 1175, 1180-81 (7th Cir. 1984)); *see also United States v. Cusimano*, 148 F.3d 824, 829 (7th Cir. 1998). In this case, neither form of amendment occurred. The jury heard neither a "complex set of facts" that differed greatly from the allegations in the superseding indictment nor evidence that proved a violation of a materially different law. To the contrary, we are convinced that the jury heard ample evidence directly supporting the allegations of the super seding indictment. Boulevard Bank officer Lewis Ruff's internal notes and correspondence indicate that in 1988 and 1989, pursuant to bank policy, Ruff repeatedly asked Swanquist for updated financial information. Ruff then used this information to calculate the risk associated with Swanquist's loans and the sagacity of renewing his existing loans or even extending further credit. For instance, upon receipt of Swanquist's June 1, 1989 financial statement, the bank decided to downgrade Swanquist's creditworthiness "because of the long carry of this unsecured credit." This evidence convinces us that the jury considered testimony and documents indicating that Boulevard Bank sought Swanquist's financial information for purposes directly related to loan activity and that the scheme proven at trial was included within the scheme charged. *See Kuna*, 760 F.2d at 819.

B. The Admission of Agent Sebo's Testimony and Summary Charts

Next, Swanquist raises three arguments in connection with Agent Sebo's testimony. He contends that the district court abused its discretion in admitting into evidence the

government's summary charts, as presented by Agent Sebo, because they contained "contested" evidence. For example, Swanquist argues that Charts 2 and 3 improperly label as "unsecured" two $8000 loans with Champion Federal Bank [one that was paid off by October of 1988 and one that was acquired in October of 19881 because no one from Champion specifically testified that these loans were unsecured and because, says Swanquist, the charts do not take into account an assignment of beneficial interest that Swanquist claims was used "to secure existing and future obligations owed to Champion."

We find no merit to this argument. Rule 1006 of the Federal Rules of Evidence permits a party to introduce in the form of a chart, summary, or calculation "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court." Fed. R. Evid. 1006; *see also United States v. Petty*, 132 F.3d 373, 379 (7th Cir. 1997). A party is not obligated, however, to include within its charts or summaries its opponent's version of the facts. *United States v. Radseck*, 718 F.2d 233, 239 (7th Cir. 1983). Swanquist had ample opportunity during his cross-examination of Agent Sebo to elicit any facts that might have suggested that the government's charts incorrectly captured the nature of his Champion Bank loans. Moreover, the court instructed the jury that the summary charts were not evidence, that they were admitted simply to aid the jurors in evaluating other evidence, and that it was for the jurors to decide whether the evidence supported the summaries. See id. (affirming admission of summary charts where "[t]he jury was admonished by the court that the exhibits purported to be only 'the Government's submission of the Government's theory'" of the case). Finally, with regard to the lack of direct testimony that the $8000 loans were unsecured, we note that the government introduced in evidence (as Exhibits

CFB 4A and 4B) a copy of Swanquist's October 1988 loan application that clearly indicates on its face that the loan was unsecured. The admission of this document into evidence renders irrelevant any lack of direct testimony. As for the other $8000 loan, Swanquist fails to direct us to any documentation establishing that this loan was secured, and our own review of the documentation pertaining to this loan likewise fails to reflect that this loan was secured.

Second, Swanquist maintains that the court erred in admitting Agent Sebo's testimony regarding the charts. We disagree. Trial courts have broad discretion to admit or exclude evidence, and we review rulings dealing with the admission of evidence only for an abuse of discretion. See United States v. Zizzo, 120 F.3d 1338, 1351 (7th Cir. 1997), cert. denied, 118 S. Ct. 566 (1998). Contrary to Swanquist's assertions, Agent Sebo did not testify as an expert witness—that is, by offering opinions and drawing inferences based on some special skill, knowledge, or experience that the jurors themselves did not possess. *See United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (remanding case after the government's summary witness invaded the province of the jury by making credibility determinations and drawing inferences from the evidence that the jury was equally qualified to make). Rather, he acted within the appropriate parameters of a summary witness by testifying simply as to what the government's evidence showed. See Radseck, 718 F.2d at 239 ("The nature of a summary witness's testimony requires that he draw conclusions based upon the evidence presented at trial.'") (quoting *United States v. Esser*, 520 F.2d 213, 218 (7th Cir. 1975)). At Swanquist's request, the court restricted Agent Sebo from offering his own opinion or inferences and instructed the jurors that it was for them to decide "whether the evidence supports all or any of the

summary evidence to which Mr. Sebo testified." Thus, we find no abuse of discretion.

Third, Swanquist contends that the district court improperly limited his cross-examination of Agent Sebo, thereby depriving him of his Sixth Amendment right of confrontation. Ordinarily, we review a trial court's curtailment of cross-examination for an abuse of discretion. Only where the limitation directly affected the defendant's Sixth Amendment right to confrontation do we conduct a *de novo review*. *United States v. Cueto*, 151 F.3d 620, 638 (7th Cir. 1998); *United States v. Sasson*, 62 F.3d 874, 882 (7th Cir. 1995) (distinguishing between peripheral concerns and "core values of the confrontation right"). Our review of the trial testimony reveals no Sixth Amendment violation—only Swanquist's frustration with his inability to extract helpful testimony from an adverse witness. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer 474 U.S. 15 20 (1985). If the defense is given an opportunity to expose "a witness's credibility, motives, or possible bias, the Sixth Amendment is not compromised by a limitation on cross-examination." *Cueto*, 151 F.3d at 638. Here, Swanquist had the opportunity to cross-examine Agent Sebo within the scope of his direct testimony. Simply because Swanquist was unable to elicit favorable answers regarding his version of the facts or to "hammer [these] point[s] home to the jury," does not mean he suffered a constitutional deprivation. *Sasson*, 62 F.3d at 882.

C. Limitations on Swanquist's Expert's Testimony

Swanquist's expert witness, Martin Levy, testified regarding his understanding of the term "net worth" and the relevance of this concept to Swanquist's financial

statements. The court, however, prohibited Levy from testifying regarding "off balance sheet financing," the accuracy of Agent Sebo's charts, or the ambiguous nature of Swanquist's financial statements on grounds that Levy was an accountant, not a banker, such that his proposed testimony likely would confuse the jury. Swanquist now insists that the trial court "effectively gutted" the core theory of his defense by prohibiting Levy from testifying in these areas. We review the district court's ruling for an abuse of discretion. *United States v. Webster*, 125 F.3d 1024, 1032 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 698 (1998); *United States v. Willis*, 61 F.3d 526, 532-33 (7th Cir. 1995).

The district court prevented Levy from testifying about "off balance sheet financing," a financing arrangement popular in the late 1980's and early 1990's that "permitted" companies and individuals to omit certain assets and liabilities from their balance sheets, on grounds that such testimony was irrelevant and would be confusing to the jury. According to Swanquist, this testimony would have helped explain to the jury that seemingly undisclosed loans actually were accounted for within his net asset calculations. The court's ruling was not an abuse of discretion. *See United States v. Shlater*, 85 F.3d 1251, 1256 (7th Cir. 1996) (irrelevant testimony is not admissible, and the district court retains the discretion to make this determination). We agree with the court that Levy, as an accountant with no banking experience, was not qualified to tell the jury that this form of financing was acceptable within the banking community. Moreover, the financial applications at issue in this case specifically requested information pertaining to Swanquist's assets and liabilities; thus, testimony regarding a form of financing permitting the omission of this very information clearly was intended to throw smoke in the jurors' eyes.

Nor are we of the opinion that the trial court committed error with respect to its other evidentiary rulings. Regarding the financial statements, which Levy wanted to explain were ambiguous and required additional clarification, the court found that Levy was not qualified to testify regarding a banker's additional need for clarification. Special deference is due the court's assessment of the probative value of this evidence as it was in the best position to weigh probative value against "the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403; *see also United States v. Fawley*, 137 F.3d 458, 466 (7th Cir. 1998) ("a district court's Rule 403 balancing is afforded a special degree of deference: '[o]nly in an extreme case are appellate judges competent to second-guess the judgment of the person on the spot, the trial judge.'") (citations omitted). As for prohibiting Levy from attacking the contents of Agent Sebo's charts by pointing out Sebo's lack of consideration for Swanquist's explanations regarding the financial deficiencies, we note that the government was not required to include in its charts the defense's version of the facts. Accordingly, the court acted well within its discretion in excluding this line of Levy's testimony.[2]

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[2] During his closing argument, defense counsel attempted to undermine Agent Sebo's credibility by pointing out his failure to rebut key points of Levy's testimony. Following an objection by the government, the court stated that the defense's statement to the jury was inappropriate in light of the restrictions it had placed on Agent Sebo's testimony at Swanquist's urging. We find no merit to Swanquist's contention that the court's comment was erroneous. Indeed, we agree that since Agent Sebo was not allowed to rebut Levy's testimony, defense counsel's statement during closing was improper.

D. Swanquist's "Net Worth" Defensive Theory

Next, Swanquist challenges the district court's refusal to charge the jury with his "net worth" defense theory. He contends that the court refused to give his proposed defensive theory instruction, which stated that it was his

> theory of the defense that the financial statements and mortgage applications which he provided to the banks and financial institutions involved here were not false and represented his understanding of his financial position at the time the statements were prepared, *including his knowledge of his debts and net worth* (emphasis added).

Although the trial court included in its final charge all but the emphasized language, Swanquist argues that the edit prevented the jurors from considering his defensive theory that people who understate their liabilities on "one or two lines" of a financial statement do so without criminal intent if, at the time, they have a substantial net worth. In other words, since bankers rely on an applicant's "total financial statement," a conviction for falsifying answers about specific categories of liabilities should only be sought where the applicant/defendant materially understated his net worth.

It is well settled in this circuit that a defendant is entitled to a jury instruction as to his or her particular theory of defense provided: "(1) the instruction represents an accurate statement of the law; (2) the instruction reflects a theory that is supported by the evidence; (3) the instruction reflects a theory which is not already part of the charge; and (4) the failure to include the instruction would deny the appellant a fair trial." *United States v. Edwards*, 36 F.3d 639, 645 (7th Cir. 1994) (citations omitted); *see*

also United States v. Linwood, 142 F.3d 418, 422 (7th Cir.) (quoting *Edwards*), *cert. denied*, 119 S. Ct. 224 (1998). We review the district court's ruling for an abuse of discretion. *Mary M. v. North Lawrence Community School Corp.*, 131 F.3d 1220, 1225 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2369 (1998). Reversal is warranted only if Swanquist can satisfy all four criteria listed above. *United States v. Akinsanya*, 53 F.3d 852, 857 (7th Cir. 1995).

Swanquist's argument fails because his proposed jury instruction fails to state the law accurately. Swanquist's position is that the false statements in the financial statements and applications submitted to the various banks do not give rise to criminal liability because his allegedly high net worth was of sufficient magnitude to render insignificant any "understatements." In other words, he says, the false statements were not material.[3] However, as the Supreme Court made clear in a case pending at the time of Swanquist's trial, the proper interpretation of § 1014 is one that excludes any element of materiality. *United States v. Wells*, 519 U.S. 482, 490-91 (1997). Thus, although the district court before the announcement of Wells understandably followed this court's erroneous construction of § 1014 when it instructed the jury as to materiality, materiality is not, and never was, an element of the crime of knowingly making a false statement to a federally-insured bank under § 1014. *See United States v. Pribble*, 127 F.3d 583, 588 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1056 (1998) (acknowledging, in a case tried before *Wells* but argued on appeal after *Wells*, that

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[3] "Materiality" is defined as "ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decision making body to which it was addressed." *United States v. Wells*, 519 U.S. 482, 489 (1997) (citations and internal quotations

materiality is not an element of § 1014 and thus holding that the district court had not erred in refusing to apply pre-*Wells* precedent). Accordingly, Swanquist's proposed jury instruction properly was withheld from the jury's consideration.

E. The Elements-of-the-Offense Jury Instruction

Swanquist also takes issue with the district court's instruction on the essential elements of § 1014. Swanquist proposed at trial that the court give a separate elements-of-the-offense instruc-tion for each of the counts of the superseding indictment, all of which alleged a violation of § 1014. Instead, the court charged the jury in Instruction 18 as follows:

> The defendant Breck Swanquist is charged in Counts One [through] Sixteen of the indictment with violations of Title 18, United States Code, Section 1014. That statute states in pertinent part:
>
> > Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are [federally] insured . . . upon any application or loan . . . .
>
> shall be guilty of an offense against the United States.

In its next instruction, Instruction 19, the court, in relevant part, charged the jury as follows:

> To sustain the charges in Counts One [through] Sixteen of the indictment, the government must prove the following propositions as to each count:
>
> First: that the defendant made or caused to be made a false statement to a bank or financial institution;

> Second: that the defendant knew that the statement was false at the time it was made;
>
> Third: that the defendant made the statement with the intent to influence the action of the bank or financial institution in issuing, approving, or renewing a loan or line of credit ....

Focusing exclusively on Instruction 18, Swanquist argues that the charge as given permitted the jury to convict if it found that he made "any false statement" for the purpose of influencing "in any way" the actions of the recipient financial institution, as opposed to permitting conviction only upon proof that the statements charged in the indictment were false and made for purposes of influencing the recipient financial institutions in issuing, approving, or renewing loans. In other words, says Swanquist, the jury instruction constructively amended the superseding indictment and deprived him of his right to be tried only on the charges returned by the grand jury.

"In determining the correctness of jury instructions, a reviewing court 'must determine from looking at the charge as a whole, whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.'" *Fawley*, 137 F.3d at 467 (quoting *United States v. Abdelkoui*, 19 F.3d 1178, 1182 (7th Cir. 1994)). Applying this standard, we are convinced that the jury instructions sufficiently apprised the jury of the applicable law and that no constructive amendment occurred. Although the "in any way" language recited in Instruction 18 reads more broadly than the language of the superseding indictment, any possibility of a constructive amendment concerning the kind of activities being prosecuted was cured by the language of Instruction 19, which informed the jury that in order to sustain a conviction on any count, it had to find that Swanquist made

a false statement to a financial institution; that he knew the statement was false at the time it was made; and that he made the statement with the intent to influence the action of the financial institution in issuing, approving, or renewing loans. As for the "any false statement" language of Instruction 18, we fail to see how the court's instructions could have permitted conviction for an offense beyond the parameters of the superseding indictment. We also note that the jury acquitted Swanquist on three of the sixteen counts, thereby indicating that it paid close attention to the specific allegations of the superseding indictment and was not misled by jury instructions that failed to mirror the indictment's exact language.

Counts one and twelve present a slightly different picture. As to these two counts, the superseding indictment simply alleges that Swanquist knowingly made false statements to NBD Bank of Evanston and Gary Wheaton Bank of Batavia for purposes of influencing the issuance of loans. Accordingly, at first blush, it would appear that Instruction 19, by also permitting conviction if the jury found that Swanquist had made the false statements to influence the approval or renewal of loans, constructively amended the indictment. However, a closer look at these counts convinces us otherwise. As discussed above, "[a] constructive amendment occurs where the offense proven at trial was not included within the parameters of the indictment." *Remsza*, 77 F.3d at 1043 (citing *United States v. Mosley*, 786 F.2d 1330, 1335 (7th Cir. 1986)). That is not the case here. The indictment charged Swanquist with submitting false financial statements to NBD of Evanston and Gary Wheaton Bank to influence the issuance of loans, and the government introduced evidence at trial indicating that Swanquist did in fact misled those financial institutions for that very purpose. The defendant has failed to direct us to anything in the record that would serve to establish that

the evidence presented at trial differed from the allegations of the superseding indictment or proved a violation of a materially different law. Accordingly, we find no error with the district court's refusal to give a separate elements instruction for each count in lieu of Instructions 18 and 19.

F. The Amount of "Loss" Calculation

Swanquist next contends that the court erroneously increased his base offense level by seven points pursuant to U.S.S.G. § 2F1.1 after determining that the amount of "loss" resulting from his conduct equaled $171,033. The district court arrived at this amount by calculating the amount of money Swanquist owed the various institutions on the date the government discovered his fraudulent conduct. Swanquist maintains that the district court should not have calculated loss from the date of the government's discovery but instead should have focused on the date the individual financial institutions discovered his fraud. Following Swanquist's suggestion, the amount of loss would be zero because, although his employer and the FBI knew about his fraud before repayment, all of his outstanding loans had been repaid before the lending institutions learned of his actions. We review for clear error the district court's loss valuation. *United States v. Kelley*, 76 F.3d 436, 439 (7th Cir. 1996).

Application Note 7(b) to § 2F1.1 provides that in fraudulent loan application cases involving a defendant who obtains a loan by misrepresenting the value of his assets, the amount of loss "is the amount of the loan not repaid at the time the offense is discovered." Although this circuit has yet to decide when an offense is "discovered" within the context of § 2F1.1, the Sixth Circuit has ruled on this very issue and has concluded that "the concept of when an 'offense is discovered' relates to discovery by the victim or the proper authorities, whichever comes first." *United*

States v. Lucas, 99 F.3d 1290, 1296 (6th Cir. 1996). The *Lucas* court also held that after "discovery" has occurred, money subsequently repaid on fraudulently procured loans may not be set off against the amount of loss calculated under Application Note 7(b). Id. at 1296-97. We agree with the analysis of the Sixth Circuit and join in its holding. Applying these definitions to the facts of this case, we conclude that the district court did not err in calculating the amount of loss caused by Swanquist's conduct from the date of the government's discovery and in adjusting his sentence accordingly.

G. Obstruction of Justice Enhancement

Finally, Swanquist maintains that the district court abused its discretion in finding that he perjured himself at trial and in increasing his base offense level by two points for obstruction of justice pursuant to U.S.S.G. § 3C1.1. Swanquist contends that the court improperly found that he was less than truthful in his testimony when he explained his state of mind at the time he completed the applications and financial statements and when he gave his purported interpretation of the categories of debt and words used on those documents. We review the court's determination regarding a defendant's obstruction of justice under the clearly erroneous standard. *United States v. Sinclair*, 74 F.3d 753, 762 (7th Cir. 1996). Factual findings with respect to sentencing will be overturned only if this court is left with " 'a definite and firm conviction that a mistake has been committed . . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *United States v. Hickok*, 77 F.3d 992, 1007 (7th Cir. 1996) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74(1985)).

Section 3C1.1 states that a sentencing court shall increase a defendant's base offense level by two points if he

"willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Perjury is one possible basis for applying this adjustment. U.S.S.G. § 3C1.1, comment. (n 3(b)). A defendant commits perjury when he "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. Agostino*, 132 F.3d 1183, 1198 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1526 (1998) (quoting *Dunnigan*). In this case, after listening to arguments at sentencing and reviewing all the evidence, the court found that Swanquist was well aware of the fact that the various loans were unsecured and that his contradictory testimony was false. For instance, although Swanquist testified that he did not disclose his $63,000 loan with First National Bank of Des Plaines because it was secured by negotiations for a home equity loan, the court saw and heard evidence establishing that the loan was unsecured until September of 1991. Similarly, although Swanquist testified that his loans with Merchants National Bank were secured, the court heard testimony to the contrary from Peter Dickes, who stated that, as of October 1988, Swanquist's loans were unsecured. The district court's findings constitute a permissible view of the evidence and thus cannot be clearly erroneous.

Swanquist's conviction and sentence are AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States District Court
For The Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 96 CR 207
v.	)	
	)	
	)	
BRECK M. SWANQUIST,	)	
	)	
Defendant.	)	

ORDER

* * *

Defendant's motions for a new trial and for a judgment of acquittal are denied. I have carefully examined each of the grounds argued by defendant to support his motions. I find them to be without merit.

ENTER ORDER:

Dated: February 11, 1997

/S/_____
Elaine E. Bucklo
United States District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 2, 1999.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the) United States District) Court for the) Northern District of) Illinois, Eastern) Division
No. 97-2702	)
v.	) No. 96 C 207) Elaine E. Bucklo,) *Judge*
BRECK M. SWANQUIST, *Defendant-Appellant.*	)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

OTHER MATERIAL WHICH THE PETITIONER BELIEVES IS ESSENTIAL TO UNDERSTANDING THE PETITION

Relevant Portions Of The Charges Contained In The Superseding Indictment

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. 96 CR 207
Plaintiff,	)	
	)	Violation: Title 18,
	)	Untitled States
v.	)	Code, Section 1014
	)	Superseding
	)	Indictment
BRECK M. SWANQUIST,	)	
	)	
Defendant.	)	

COUNT ONE

The SPECIAL JANUARY 1996 GRAND JURY charges:

* * *

COUNT TWO

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. Citizens National Bank, located in Downers Grove, Illinois, was a financial institution, the accounts of which were insured by the Federal Deposit Insurance Corporation.

2. In or about October, 1989, at Downers Grove, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made a false statement and report of material fact to Citizens National Bank, for the purpose of influencing Citizens National Bank in approving, issuing, and renewing a loan to the defendant, in that the defendant stated and reported in a financial statement dated October 1, 1989, submitted to Citizens National Bank, that in addition to revolving charge accounts, auto loans and real estate mortgages, he had unsecured debt, the outstanding balance of which was $19,000, whereas, as defendant then knew, the above statement and report was false in that he had unsecured debt, the outstanding balance of which was substantially in excess of $19,000;

In violation of Title 18, United States Code, Section 1014.

COUNT THREE

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. Boulevard Bank, located in Chicago, Illinois, was a financial institution, the accounts of which were insured by the Federal Deposit Insurance Corporation.

2. On or about April 3, 1989, at Chicago, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made a false statement and report of material fact to Boulevard Bank, for the purpose of influencing Boulevard Bank in approving, issuing, and renewing a loans to the defendant, in that the defendant stated and reported in a financial statement dated October 1, 1989, submitted to Boulevard Bank, that in addition to revolving charge accounts, auto loans and real estate mortgages, he had unsecured debt, the outstanding balance of which was $19,000, whereas, as defendant then knew, the above statement and report was false in that he had unsecured debt, the outstanding balance of which was substantially in excess of $19,000;

In violation of Title 18, United States Code, Section 1014.

COUNT FOUR

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. First National Bank of Des Plaines, located in Des Plaines, Illinois, was a financial institution,

the accounts of which were insured by the Federal Deposit Insurance Corporation.

2. In or about June, 1989, at Des Plaines, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made false statements and reports of material fact to First National Bank of Des Plaines, for the purpose of influencing First National Bank of Des Plaines in approving, issuing, and renewing a loan to the defendant, in that the defendant stated and reported in a financial statement dated June 1, 1989, submitted to First National Bank of Des Plaines, that the outstanding balance of his real estate mortgage was $398,000, the outstanding balance of his auto loans was $45,000, and the outstanding balance of his unsecured debt was $16,000, whereas, as defendant then knew, the above statements and reports was false in that the outstanding balance of each type was substantially in excess of those amounts;

In violation of Title 18, United States Code, Section 1014.

COUNT FIVE

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. Merchants National Bank, located in Aurora, Illinois, was a financial institution, the accounts of

which were insured by the Federal Deposit Insurance Corporation.

2. In or about June, 1989, at Aurora, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made false statements and reports of material fact to Merchants National Bank, for the purpose of influencing Merchants National Bank in approving, issuing, and renewing loans to the defendant, in that the defendant stated and reported in a financial statement dated June 1, 1989, submitted to Merchants National Bank, that the outstanding balance of his real estate mortgage was $398,000, the outstanding balance of his auto loans was $45,000, and the outstanding balance of his unsecured debt was $16,000, whereas, as defendant then knew, the above statements and reports was false in that the outstanding balance of each type was substantially in excess of those amounts;

In violation of Title 18, United States Code, Section 1014.

COUNT SIX

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. Boulevard Bank, located in Chicago, Illinois, was a financial institution, the accounts of which were insured by the Federal Deposit Insurance Corporation.

2. On or about January 30, 1990, at Chicago, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made false statements and reports of material fact to Boulevard Bank, for the purpose of influencing Boulevard Bank in approving, issuing, and renewing loans to the defendant, in that the defendant stated and reported in a financial statement dated June 1, 1989, submitted to Boulevard Bank, that the outstanding balance of his real estate mortgage was $398,000, the outstanding balance of his auto loans was $45,000, and the outstanding balance of his unsecured debt was $16,000, whereas, as defendant then knew, the above statements and reports was false in that the outstanding balance of each type was substantially in excess of those amounts;

In violation of Title 18, United States Code, Section 1014.

COUNT SEVEN

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. Mid America Federal Savings Bank, located in Naperville, Illinois, was a financial institution, the accounts of which were insured by the Federal Savings and Loan Insurance Corporation.

2. On or about April 20, 1990, at Naperville, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made a false statement and report of material fact to Mid America Federal Savings Bank, for the purpose of influencing Mid America Federal Savings Bank in approving, issuing, and renewing loans to the defendant, in that the defendant stated and reported in a financial statement dated March 1, 1990, submitted to Mid America Federal Savings Bank, that in addition to auto loans and real estate mortgages, he had notes payable, the outstanding balance of which was $105,000, whereas, as defendant then knew, the above statements and reports was false in that he had notes payable, the outstanding balance of which was substantially in excess of $105,000;

In violation of Title 18, United States Code, Section 1014.

COUNT EIGHT

The SPECIAL JANUARY 1996 GRAND JURY further charges:

1. At all times material herein:

a. Breck M. Swanquist was the president, chief executive officer, and chairman of the board of directors of Gary Wheaton Bank of Fox Valley.

b. Aurora National Bank, located in Aurora, Illinois, was a financial institution, the accounts of which were insured by the Federal Deposit Insurance Corporation.

2. In or about August, 1990, at Aurora, in the Northern District of Illinois, Eastern Division,

BRECK M. SWANQUIST,

defendant herein, knowingly made and caused to be made a false statement and report of material fact to Aurora National Bank, for the purpose of influencing Aurora National Bank in approving, issuing, and renewing loans to the defendant, in that the defendant stated and reported in a financial statement dated March 1, 1990, submitted to Aurora National Bank, that in addition to auto loans and real estate mortgages, he had notes payable, the outstanding balance of which was $105,000, whereas, as defendant then knew, the above statements and reports was false in that he had notes payable, the outstanding balance of which was substantially in excess of $105,000;

In violation of Title 18, United States Code, Section 1014.

* * *

A TRUE BILL:

S/_____
Mrs. Mary L. Frances
Foreperson

/S/_____
James B. Burns
United States Attorney

GOVERNMENT EXHIBIT

Chart 2

Citizens National Bank
Loan #48774
Financial Statements Dated - 10/1/88
Financial Statement Submitted - October 1988

LOANS DISCLOSED		ACTUAL UNSECURED DEBT	as of 10/1/88	as of 10/18/88
UNSECURED DEBT/ incl. 3 IGLP LOANS	$19,000	CHAMPION FEDERAL		
		#30-0010152475	$8,000	$0
		#30-000501951	$0	$8,000
		FIRST NATIONAL BANK OF DESPLAINES		
		#9007574-64022	$40,000	$40,000
		MERCHANTS NATIONAL BANK		
		#37854 (#36898/#37580)	$63,499	$63,499
		#38426 (#36535)	$25,003	$25,003
		BOULEVARD BANK		
		#90258-1-01-0	$26,000	$26,000
		#89284-0-13-0	$10,000	$10,000
		SUBURBAN NATIONAL BANK		
		#17357 (#17314)	$10,409	$10,409
		AURORA NATIONAL BANK		
		#8390738	$4,760	$4,417
	$19,000		$187,671	$187,328

GOVERNMENT EXHIBIT
Chart 3

Boulevard Bank
Loan #90258-0-04-0
Loan #90258-1-01-0
Loan#89284-0-13-0
Financial Statements Dated - 10/1/88
Financial Statement Submitted - 4/3/89

LOANS DISCLOSED		ACTUAL UNSECURED DEBT	as of 10/1/88	as of 10/18/88
UNSECURED DEBT/ incl. 3 IGLP LOANS	$19,000	CHAMPION FEDERAL #30-0010152475	$8,000	$0
		#30-000501951	$0	$8,000
		FIRST NATIONAL BANK OF DESPLAINES		
		#9007574-64022	$40,000	$40,000
		MERCHANTS NATIONAL BANK		
		#37854 (#36898/#37580)	$63,499	$0
		#38426 (#35323/#36100)	$25,003	$0
		#38828 (#38426#38537)	$0	$88,063
		BOULEVARD BANK		
		#90258-0-04-0		$11,000
		#90258-1-01-0	$26,000	$26,000
		#89284-0-13-0	$10,000	$10,000
		SUBURBAN NATIONAL BANK		
		#17357	$10,409	$0
		#17408 (#17357)	$0	$6,214
		AURORA NATIONAL BANK		
		#8390738	$4,760	$0
	19,000		$187,671	$189,277

GOVERNMENT EXHIBIT

CNB 1

Breck and Colleen Swanquist
Personal Financial Statement - Self-prepared
10-1-88

Cash/Bonus/401K Plan	$ 48,000	Auto Loans	$ 26,000
Marketable Securities (Net)	72,000	Unsecured Debt/ incl. 3 IGLP Loans[4]	19,000
Real Estate Owned[1]	665,000	Real Estate Mortgages	398,000
Pension Plan - G-W Bank	15,000	2 VISA Preferred Cards	9,000
1/3 Beneficial Interest in Trust[2]	145,000	Misc. Bills, Utilities, Taxes Accruals	12,000
Gold, Coins, 1 ct. diamond[3]	9,000		
Automobiles	17,000	Total Liabilities	$ 464,000
Hunter/Jumper Horse	22,000	Net Worth	554,000
Personal Property	25,000	Liab. & Net Worth	$1,018,000
Total Assets	$ 1,018,000		

Income

BMS - Current salary + 1989 Corp. Bonus	$120,000
Money Purchase Pension Contribution	11,000
Trust Fee Income	1,500
Auto Lease Value, Gas & Ins.	7,800
CHS - Family Bus.	3,500
1st Chicago Stock Dividends	10,500
	$154,300

[1]Personal residence on 1 ½ acres and one acre adjacent 7 S 570 Donwood, Naperville, IL (as appraised 1 yr. ago 5%)

[2]Merchants National Bank Irrevocable Trust in name of M. Swanquist

[3]As insured

[4]Three yrs left of 10-yr. payout

/s/_____ Breck M. Swanquist

/s/_____ Colleen H. Swanquist

Dated: 10-1-88, 1988

Portion of Trial Testimony
Relating To Changes In Counts 2 & 3
Of The Superseding Indictment

Monday, October 7, 1996

Witness: FBI Special Agent Gary Sebo
(on cross-examination)

Q: Have you had occasion before you summarized these exhibits to look at Defendant's Exhibit 311?

A: No.

Q: May I show it to you, sir. Didn't Mr. Swanquist provide to Champion an assignment of the beneficial interest in his property, which was dated before October of 1988?

A: This has to do with a different loan?

Q: Sir?

A: I'm not sure what loan this has to do with?

* * *

Q: That document is an assignment of the beneficial interest in his property, would you agree with that?

A: Yes, I will agree with that.

Q: And its dated prior to October 10, 1988, would you agree with that?

A: Yes, June 3rd, 1988?

Q: Pardon me?

A: June 3rd, 1988?

Q: Yes. Have you seen that document before?

A: No, I have not.

Q: May I have it please.

So you did not take this document into consideration in determining that the Champion Debt of $8000 was unsecured, correct?

A: That particular loan. I have other documents that show that it was unsecured. He had several loans at Champion, some secured and some unsecured. This particular loan was unsecured.

Trial Transcript at pp. 752-53.

Thursday, October 3, 1996

Witness: Mr. Lewis Ruff, former
Loan Officer at the Boulevard Bank
(on cross-examination)

Q: All right, and these are the kind of notes that you signed, you had Breck Swanquist sign?

A: Well these are a number of notes. The notes have changed so many times, I really couldn't say for sure, sir.

Q: Okay. And this also had a paragraph requiring or setting forth the security arrangement. Do you remember that?

A: Security arrangement?

Q: Well, it mentions that, yes, that the bank has a continuing lien on various –

A: Well, that's verbiage that's used?

Q: In all your notes?

A: In all the notes.

Q: Has a continuing lien on all instruments, documents, title, policies, insurance, deposits, moneys, stuff like that, that's the form you use, isn't it?

A: That was used there, yes.

Q: Well, most of your notes have that kind of a statement in it to protect yourself, don't you?

A: Yes.

* * *

Q: I understand that, but I not saying that as, since the notes were not technically withdrawn or renewed until the consolidation, you didn't at any time take that language out of the note, did you?

A: I can't be certain. If that's the note that was used and it's in there, it's obviously in there.

Trial transcript at 311-12; 317.

Monday, October 7, 1996

Witness: FBI Special Agent Gary Sebo
(on cross-examination)

Q: Did you give any consideration in preparing the chart you are talking about, which is Chart No. 2, to the fact that the securities are listed as hearing a net value?

A: No, I did not.

Q: "Net" means what to you, sir?

A: I don't know what he means by "net". I have no idea.

Trial transcript at p. 764.

GOVERNMENT EXHIBIT

Chart 4

First National Bank of Des Plaines
Loan #9007574-64022
Financial Statement Dated - 6/1/89
Financial Statement Submitted - June 1989

LOANS DISCLOSED		ACTUAL UNSECURED DEBT	as of 6/1/89	as of 6/26/89
REAL ESTATE MORTGAGES	$398,000	CHAMPION FEDERAL #30-00503377	$80,024	$80,024
		MIDWEST MORTGAGE #950054-5	$396,762	$396,762
	$398,000		$476,816	$476,816
AUTO LOANS	$45,000	CITIZENS NATIONAL BANK #48774	$54,477	$54,477
		FIRST NATIONAL BANK OF ELGIN #0680221823	$2,660	$2,365
	$45,000		$57,137	$56,842
UNSECURED DEBT/ incl. 3 IGLP LOANS	$16,000	FIRST NATIONAL BANK OF DES PLAINES #9007574-64022	$40,000	$40,000

MERCHANTS NATIONAL BANK #38828 (#38426#38537)	$87,359	$87,359
BOULEVARD BANK		
#90258-0-04-0	$11,000	$11,000
#90258-1-01-0	$26,000	$26,000
#89284-0-13-0	$10,000	$10,000
SUBURBAN NATIONAL BANK #17408	$6,214	6,214
AURORA NATIONAL BANK #8390738	$4,900	$4,900
	$185,473	$185,473

GOVERNMENT EXHIBIT

Chart 5

First National Bank of Des Plaines
Loan #39153
Loan #39598
Loan #99-5189816
Loan #38828
Financial Statement Dated - 6/1/89
Financial Statement Submitted - June 1989

LOANS DISCLOSED		ACTUAL UNSECURED DEBT	as of 6/1/89	as of 6/29/89
REAL ESTATE MORTGAGES	$398,000	CHAMPION FEDERAL #30-00503377	$80,024	$80,024
		MIDWEST MORTGAGE #950054-5	$396,762	$396,489
	$398,000		$476,816	$476,513

AUTO LOANS	$45,000	CITIZENS NATIONAL BANK #48774	$54,477	$54,477
		FIRST NATIONAL BANK OF ELGIN #0680221823	$2,660	$2,069
	$45,000		$57,137	$56,546
UNSECURED DEBT/ incl. 3 GLP LOANS	$16,000	FIRST NATIONAL BANK OF DES PLAINES #9007574-64022	$40,000	$40,000
		MERCHANTS NATIONAL BANK #38828 (#38426#38537)	$87,359	$87,359
		BOULEVARD BANK #90258-0-04-0	$11,000	$11,000
		#90258-1-01-0	$26,000	$26,000
		#89284-0-13-0	$10,000	$10,000
		SUBURBAN NATIONAL BANK #17408	$6,214	$6,214
	$16,000	AURORA NATIONAL BANK #8390738	$4,900	$4,900
			$185,473	$185,473

GOVERNMENT EXHIBIT

Chart 6

First National Bank of Des Plaines
Loan #90258-0-40-0
Loan #90258-1-01-0
Loan #89284-0-13-0
Financial Statement Dated - 6/1/89
Financial Statement Submitted - 1/30/90

LOANS DISCLOSED		ACTUAL UNSECURED DEBT	as of 6/1/89	as of 1/30/90
REAL ESTATE MORTGAGES	$398,000	CHAMPION FEDERAL #30-00503377	$80,024	$80,024
		MERCHANTS NATIONAL MORTGAGE #99-5189816	$0	$75,510
		MIDWEST MORTGAGE #950054-5	$396,762	$395,018
	$398,000		$476,816	$550,552
AUTO LOANS	$45,000	CENTRUST #5060652	$0	$53,000
		CITIZENS NATIONAL BANK #48774	$54,477	$49,477

		FIRST NATIONAL BANK OF ELGIN #0680221823	$2,660	$0
	$45,000		$57,137	$102,477
UNSECURED DEBT/ incl. 3 IGLP LOANS	$16,000	CHAMPION FEDERAL #30-000504144	$0	$16,304
		FIRST NATIONAL BANK OF DES PLAINES #9007574-64022	$40,000	$37,000
		MERCHANTS NATIONAL BANK #38828 (#38426#38537)	$87,359	$86,090
		#39153	$0	$18,000
		#39598	$0	$40,000
		BOULEVARD BANK #90258-0-04-0	$11,000	$11,000
		#90258-1-01-0	$26,000	$25,500
		#89284-0-13-0	$10,000	$9,500
		SUBURBAN NATIONAL BANK #17408	$6,214	$0
		AURORA NATIONAL BANK #8390738	$4,900	$4,908
	$16,000		$185,473	$248,302

Breck and Colleen Swanquist
Personal Financial Statement - Self-prepared
06/01/89

Cash/Bonus/40 IK Plan	$ 46,000	Auto Loans	$ 45,000
Marketable Securities (Net)	8,000	Unsecured Debt/ incl. 3 IGLP Loans[4]	16,000
Real Estate Owned[1]	675,000	Real Estate Mortgages	398,000
Pension Plan - G-W Bank	35,000	2 VISA Preferred Cards	9,000
1/3 Beneficial Interest in Trust[2]	155,000	Misc. Bills, Utilities, Taxes & Accruals	25,000
Gold, Coins, 1 ct. diamond[3]	12,000		
Automobiles	45,000	Total Liabilities	$ 493,000
Hunter/Jumper Horse	22,000	Net Worth	550,000
Personal Property	45,000	Liab. & Net Worth	$1,043,000
Total Assets	$ 1,043,000		

Income

BMS - Current salary + 1989 Corp. Bonus	$151,200
Money Purchase Pension Contribution	14,200
Trust Fee Income	3,500
Auto Lease Value, Gas & Ins.	8,500
Director's Fees	3,000
1st Chicago Stock Dividends	2,800
	$183,200

[1]Personal residence on ½ acres and one acre adjacent 7 S. 570 Donwood, Naperville, IL (as appraised)

[2]Merchants National Bank Irrevocable Trust in name of M. Swanquist

[3]As insured

[4]Three yrs. left of 10-yr. payout

/s/ Breck M. Swanquist

/s/ Colleen H. Swanquist

Dated: June 1, 1989

Portion of Trial Testimony of Defendant Breck M. Swanquist regarding the Champion Assignment of Beneficial Interest In Land Trust

Monday, October 7, 1996 Witness: Defendant Beck M. Swanquist (on direct examination)

Q: Let's talk about Champion for a moment. What security had you given Champion for any loans that you would have with Champion?

A: I had given him my stock.

Q: What is an assignment of your beneficial interest?

A: That's an assignment of a trust that would contain property.

Q: Well, most of us don't keep property in trust. What property was in trust?

A: The property that was in trust at that time that also was secured or was pledged, rather from time to time to Champion was the two-and-a-half acres and the home that we talked about on Homewood Drive in South Naperville.

Q: All eight. Was there a mortgage on that property?

A: There was a first mortgage on that property; but that had nothing to do with the Champion indebtedness.

Q: Well, I am trying to get to that. What is the difference between a mortgage in a property and an assignment of the beneficial interest in the property?

A: Well, my understanding -- again, I'm not an attorney. But from my banking background, a mortgage is clearly a mortgage. It's just that. It is a piece of real

estate that is mortgaged. And a mortgage is recorded at -- I don't know, the county seat or the recorder of deeds. And that's what is pledged as collateral, while an assignment of a trust is clearly that. It's a trust. It can have various kinds of property in it.

And the balance of the equity or whatever that trust is worth is assigned to the bank. No mortgage is typically recorded.

Trial transcript at pp. 886-87.

GOVERNMENT EXHIBIT
Chart 7

Mid America Federal Savings Bank
Loan #75-0000269
Loan #75-0000271
Financial Statement Dated - 3/1/90
Financial Statement Submitted - 4/20/90

LOANS DISCLOSED		ACTUAL LOANS	as of 3/1/90	as of 4/20/90
NOTES PAYABLE Incl. 3 IGLP LOANS	$105,000	CHAMPION FEDERAL #30-504144	$15,000	$15,000
		FIRST NATIONAL BANK OF DES PLAINES #9007574-64002	$35,500	$35,500
		MERCHANTS NATIONAL BANK #39838	$144,090	$144,090
		BOULEVARD BANK		
		#90258-0-04-0	$11,000	$11,000
		#90258-1-01-0	$25,000	$25,000
		#89284-0-13-0	$10,000	$10,000
		AURORA NATIONAL BANK #8390738	$4,908	$4,953

	DEERE CREDIT SERVICES #05328503881	$5,925	$5,311
	CITIZENS NATIONAL BANK #49046	$0	$12,000
	AMERICAN GENERAL FINANCE #9831419	$6,505	$6,202
$105,000		$257,928	$269,056

Aurora National Bank
Loan #6900-55847
Loan #6900-55812
Financial Statement Dated - 3/1/90
Financial Statement Submitted - August 1990

LOANS DISCLOSED		ACTUAL LOANS	as of 3/1/90	as of 8/3/90
NOTES PAYABLE Incl. 3 IGLP LOANS	$105,000	CHAMPION FEDERAL #30-504144	$15,000	$16,000
		FIRST NATIONAL BANK OF DES PLAINES #9007574-64002	$35,500	$35,500
		MERCHANTS NATIONAL BANK #39838	$144,090	$144,090
		BOULEVARD BANK #90258-0-04-0	$11,000	$11,000
		#90258-1-01-0	$25,500	$25,500
		#89284-0-13-0	$ 9,500	$ 9,500
		AURORA NATIONAL BANK #8390738	4,908	$5,000
		DEERE CREDIT SERVICES #05328503881 AB	$5,925	$4,537
		CITIZENS NATIONAL BANK #49046	$0	$11,000

AMERICAN GENERAL FINANCE #9831419	$6,505	$4,880
MID AMERICA FEDERAL		
#75-0000269	$0	$35,000
#75-0000271	$0	$35,000
	$257,928	$337,007

Breck and Colleen Swanquist
Personal Financial Statement - Self-prepared
3/1/90

Cash/Bonus/401K Plan	$ 28,000	Auto Loans	$ 55,000
Real Estate Owned[1]	$690,000	Notes Payable incl. 3 IGLP Mrtgs.	$105,000
Pension Plan – GWBnk	76,000	Real Estate Mrtgs.	540,000
1/3 Beneficial Interest in Trust[2]	145,000	Misc. Bills, Utilities, Taxes & Accruals	$30,000
Gold, Coins, 1 ct. diamond[3]	12,000		
Vehicles/Trailers	95,000	Total Liabilities	$730,000
		Net Worth	466,000*
Horses	110,000		
Personal Property	40,000		
Total Assets	$ 1,196,000	Liab. & Net Worth	$1,196,000

Income

BMS -	Current salary + 1989 Corp. Bonus[4]	$172,000
	Money Purchase Pension Contribution	12,000
	Auto Lease Value, Gas & Ins.	8,000
		$192,000

*Net worth does not include First Chicago stock held jointly by BMS & CHS, and First Chicago stock options in name of BHS - none of which is encumbered.

[1]Personal residence on 2-1/2 acres –7 S 570 Donwood Dr., Napeville, IL (as appraised)

[2]Merchants National Bank Irrevocable Trust in name of M. Swanquist

[3]As insured

[4]1990 salary and bonus projected at $195,000

/s/_____ /s/_____

Breck M. Swanquist Colleen H. Swanquist

Dated: March 1, 1990

Portion of Trial Testimony of FBI Special Agent Gary Sebo regarding Government's Treatment of the Champion Assignment of Beneficial Interest In Land Trust

Monday, October 7, 1996

Witness: FBI Special Agent Gary Sebo

Q: Okay. But when you compare the financial statement of June with the financial statement that we have got here, meaning March, Mr. Swanquist disclosed 540 or $550,000 of mortgages in the March statement, did he not? If you will look at the statement, please, 3/1/90, please.

A: Okay, 3/1/90.

Q: So comparing his mortgage back in June, what he listed, 390,000 or something with what he's listed as a mortgage in March, it obviously went up by $140,000 or $150,000, correct?

A: That appears that he listed it that way.

* * *

Q: Okay. That's the only thing I am trying to say, sir.

And from June 1, 1989, to February of 1990, he only had one additional mortgage, that's the one with the Merchants, correct?

A: From June 1st of 1990?

Q: '89 till February of 1990, the new mortgage that he got was with the Merchants, correct?

A: Let me double check that.

Q: Are you looking at your work papers?

A: Pardon?

Q: You are looking at your work papers?

A: Yes, I'll look at my work papers.

Q: Thank you.

A: June of what, '89?

Q: June of '89 until February of '90, isn't it true that he just had one mortgage added, and that was the Merchants mortgage?

A: No. I can't tell from this chart. I'd have to see the actual documents to -- if you are going to be specific about whether it's a mortgage or –

Q: No, no, that isn't my point.

A: Because this chart doesn't say whether it's a mortgage or a horse loan or what type of loan it is. So I can't really say, unless I see some Merchants documents that say specifically. I'll testify to the documents.

Q: All right. Thank you. But as you sit here today, the only one you can recall is the July 13th, 1989, mortgage with the Merchants, correct?

A: Initially, there was just one mortgage; and then he ended up with two at Merchants.

Q: So that you have put in your chart a lot of the Merchants National Bank loan, like the 87,000, in as an unsecured loan, haven't you?

A: Are you talking on March 1st?

Q: Well, between –

A: March 1st statement?

Q: Yes. On your Chart 7, you didn't break it down the way Mr. Swanquist did?

A: No, because he didn't break it down according to unsecured notes on the March 1st, 1990, statement.

Q: So you didn't know –

A: So I didn't break it down.

Q: Excuse me. So you didn't know that he had calculated it this way, correct?

MS. BILAISIS: Objection, Your Honor. There is no evidence that he, Mr. Swanquist, how Mr. Swanquist calculated that.

THE COURT: Which side are you talking about?

MR. FOOTE: Pardon me?

THE COURT: Which are you talking about at this point?

MR. FOOTE: I didn't hear Your Honor. I'm sorry.

THE COURT: Which are you talking about?

MR. FOOTE: I am talking about the fact that Mr. Swanquist, as the witness says, has apparently added to his mortgages from 390 to 540.

THE WITNESS: I didn't say that.

BY MR. FOOTE:

Q: Okay? All I'm suggesting is that you didn't do it that way. You treated all of the 144,000 of Merchants on your chart as unsecured; is that a fair statement?

A: The document for that loan will say that it's unsecured.

Q: Okay. Sir –

A: At that point.

Q: Did you -- do you remember Mr. Dickes' testimony regarding the $75,000 mortgage?

A. Sure.

Q: Okay, and when my partner, Mr. McCabe, asked him questions about that, didn't he say as to the mortgage, so with respect to any of Mr. Swanquist's loans at the Merchants, if he can't pay, you can foreclose on this property. And Mr. Dickes said correct. Isn't that what happened?

Would you like to read it?

A: Yes, I would like to read it.

Q: Page 46.

A: Which paragraph? Oh.

Q: Well, its down at the bottom.

A: Down at the bottom?

Q: Yes, sir.

A: That's what it says.

Q: Thank you.

A: In this document.

Q: It's not a big point, sir, but what I am really trying to get at is the fact that you treated the 144,000 as all unsecured, whereas Mr. Swanquist put the 87,000 with the 75,000 and added it to the line of mortgages; isn't that what happened?

MS. BILAISIS: Objection, Your Honor. There is nothing to show Mr. Swanquist made any kind of calculations.

MR. FOOTE: Oh. Well, he will testify, Your Honor; but I am asking him if he knew that.

THE COURT: I think you need to ask a different question.

MR. FOOTE: Okay. I'll leave it there then.

BY MR. FOOTE:

Q: Just one last question then. With respect to the addition of the 110,000 of notes payable, I gather that you did not know that that was Mr. Swanquist's position, that that was what he was disclosing in the 105,000, correct?

A: Well, according to the statement, I see what he disclosed. And if you look at my chart, you can see what he didn't disclose.

Q. Okay, that's interesting. But my point, sir, was the -- whether he should have disclosed the other things depends upon whether the jury finds that they are secured or unsecured. I am asking you whether you had ever prepared a statement of what were the notes payable, totaling approximately 105,000?

A. I played around with the figures.

Q. You did not know that this was Mr. Swanquist's state of mind, correct?

A. That's correct.

Trial Transcript at pp. 810-814

Portion of Trial Testimony of Defendant Breck M. Swanquist Regarding His Treatment of the Champion ABI on His 6/1/89 and 3/1/90 Financial Statement

Tuesday, October 8, 1996

Witness: Defendant Breck M. Swanquist
(on direct examination)

Q: Let me talk for a moment about the -- let me talk for a moment about the financial, let's call it, developments that you had with the Merchants Bank. When was the actual mortgage entered into with the Merchants Bank?

A: Again, it was some time in the month of July of this year.

Q: Of 1989?

A: That's correct?

Q: And at that time, then, and in the financial statement that you next filed, how did you treat the 87,000 Merchants obligation which you disclosed to Mr. Bogenberger on the financial statement?

A: Well, just as it was. Subsequent to that date, it was secured.

Q: The mortgage papers, as I recall them, refer to the $75,000 additional money. Do you recall that?

A: Yes.

Q: And what was your attitude or position at that time as to what the $87,000 loan, how that related to the mortgage?

A: Well, by the documentation itself, and as I recall, Mr. Dickes' testimony at Merchants Bank, the two were tied to that same mortgage. It covered both loans.

Q: And in what sense were they tied?

A: Well, he had the right to foreclose on my property on either loan had there been a default or past due status.

Q: So whether right or wrong, you basically included as a formal mortgage both the 87,000 and the 75,000?

A. Well, I think that was reasonable to do, yes.

Q: Well, all I am saying is in the financial statements that follow, for example, the one in March of 1990 -- we'll get to that in a moment.

But I notice that your real state mortgages are no longer 390,000; but you in your financial statement disclose real estate mortgages of almost $550,000. So why does your next financial statement show this substantial increase in your mortgages?

A: Well, again, it shows just what I told the banks we were doing and what I believe they understood we were doing. I took the first mortgage I had with Midwest Mortgage Services, which was roughly 395 at that time, 390, and I added the Merchants Bank indebtedness, which at that time was about $140,000 and came up with 530 or $535,000.

Q: All right. Let me go further with the Merchants. At the time you were getting this mortgage with the Merchants in the summer of 1989, what was your relationship with the Merchants Bank? How would you describe it?

A: Well, it was excellent. My loans were current. They had just given me a new $75,000 loan against which they had offered me $210,000. I didn't take the total amount that was offered to me; and subsequent to this, they continued to lend me money, some of it unsecured.

Q: Well, I was going to ask you about that. One of these charts that went over with, referring to -- that's not it. Yes, Defendant's Exhibit 323, you recall that we went through several work papers of Agent Sebo and identified other loans with the Merchants, one in the amount of 40,000, which is on his work papers, and another in the amount of 18,000.

After you got the mortgage and the $75,000 in 1989, did the Merchants continue to loan you additional money?

A: They did. Those the loans I was referring to.

Q: And these loans occurred then when in relationship to the July mortgage? And I'm talking again, sir -- I know this gets pretty tangled -- but about 1989.

A: Yes. Both of those loans or transactions occurred well after this date.

Q: And as a result, in your next financial statement, which is on this flip chart December -- or Defendant's 323, you treated the Merchants 40,000 and 18,000 as what, either secured or unsecured?

A: Unsecured.

Q: All right. That totals the 48,000 that Mr. Sebo and I added up when he was on the witness stand. And we'll get to this in a moment. But your next financial

statement then also included as unsecured Des Plaines?

A: That's correct; because it was.

Trial Transcript at pp. 923-26

Jury Instructions Setting Forth Elements of the Offense of Violating 18 U.S.C. § 1014, Without Reference To The Specific Charges In The Superceding Indictment

Final Jury Instructions

Thursday, October 10, 1996

The defendant, Breck Swanquist, is charged in Counts 1 through 16 of the indictment in violation of Title 18, United States Code, Section 1014. That statute states in pertinent part: "Whoever knowingly makes any false statement or report . . . for the purposes of influencing in any way the action of . . . any institution the accounts of which are federally insured . . . upon any application . . . or loan," shall be guilty of an offense against the United States.

To sustain the charges in Count 1 through 16 of the indictment, the government must prove the following propositions as to each count:

First, that the defendant made or caused to be made a false statement to a bank or financial institution.

Second, that the defendant knew that the statement was false at the time it was made.

Third, that the defendant made the statement with the intent to influence the action of the bank or financial institution in issuing or approving a loan or line of credit.

Fourth, that the false statement was material; and fifth, that at the time of the charged offense, the deposits to a bank of financial institution were federally insured. The parties are agreed that each of the banks and financial institutions named in the indictment are federally insured.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt on a particular count, then you should find the defendant guilty of that count.

On the other hand, if you find from you consideration of all of the evidence that any of these propositions is not proved beyond a reasonable doubt on a particular count, then you must find the defendant not guilty of that count.

Trial Transcript at pp. 1564-65.

Relevant Portions of The Trial Transcript Reflecting The District Court's Rulings Regarding The Scope and Content Of The Testimony of FBI Special Agent Gary Sebo, The Government's Purported "Summary" Witness

THE COURT: . . . What I don't -- I don't really understand what it is that he [Agent Sebo] is going to testify to, so it's hard for me to make rulings about specific evidence.

Now, if their -- I agree that I don't expect him to get up there and try to substitute his opinion for, you know, what the jury has to decide. But it is my understanding that isn't what he is going to do

AUSA BILAISIS: That's correct.

AUSA LIGHTFOOT: That's correct, Your Honor.

* * *

DEFENSE COUNSEL MCCABE: . . . Then if all he [Agent Sebo] is going to testify to are, based on my review of the documents, these are Mr. Swanquist's debts as of a particular point in time, that's very different from the charts we have.

AUSA LIGHTFOOT: Oh, no.

MR. MCCABE: Which identify -- no, the charts they have purport to identify loans with respect to particular categories of debt listed on Mr. Swanquist's s

statement. There is a clean inference, Your Honor, that these debts, which are listed in the right-hand column of the chart -- maybe, Your Honor, should see the chart.

AUSA BILAISIS: Your Honor, they are in the jury books at the end.

MR. MCCABE: They are right at the end. That might help. But that's the -- that's what we object to. I mean, I didn't -- I thought that the Government was going to put him on to say that in my view, based on my review of the documents, this was an unsecured loan.

AUSA LIGHTFOOT: Your Honor, we have told the defendant time and again that's not the issue.

THE COURT: I wouldn't let him do that.

AUSA LIGHTFOOT: We told him again that's not the issue, again and again.

THE COURT: He would have to be at the very least an expert in banking, or something relevant to say that; but he's not going to testify to that.

Trial Transcript at pp. 480; 482-83 (emphasis added).

Friday, October 4, 1996

THE COURT (at sidebar): My understanding was that he (Agent Sebo) was just going to summarize the loans. If he starts testifying as to what is secured or what is unsecured, then it seems to me that he is going beyond what he can do, and he is starting to comment on the testimony in ways that I don't think he can do. I mean it's either in evidence and you can argue it, or it's not.

AUSA BILAISIS: Fine, Your Honor, I will not ask him any further questions on that score then. I'm sorry, I misunderstood. My understanding was that he could --

THE COURT: No. This is not -- you know, it makes sense to summarize the documents and say, okay, these were all the loans and put it all in summary form and summarize.

AUSA BILAISIS: Okay.

THE COURT: But as to whether something is secured or unsecured, I think you have got to go by what's there. And otherwise it's sort of putting his imprimatur on it.

AUSA BILAISIS: Okay.

* * *

AUSA BILAISIS: Your Honor, may I address that particular issue, just that particular issue?

THE COURT: Yes.

AUSA BILAISIS: Your Honor, the witness (Agent Sebo) is not testifying -- well, two things with respect to that issue. My intention was not to have the witness testify that in his opinion this is a secured loan, but, rather, what I started doing with the car loan is to show him a document that says this loan on this date is secured. It's not his opinion, you read it off the d document. Then is shows another letter saying this title is now released--

THE COURT: It seems to me that --

AUSA BILAISIS: That is not opinion testimony. He's just summarizing documents. And to the extent --

THE COURT: But he doesn't have any experience to testify to that. I don't think that he can testify to that.

* * *

THE COURT: I think all this witness can testify to is what is --

AUSA LIGHTFOOT: What is evidence.

THE COURT: -- really essentially undisputed, I think which is what the balance of the loans were –

AUSA LIGHTFOOT: No.

THE COURT: Well, that's my reading of the [Benson] case, so you're stuck with it.

Trial transcript at pp. 642-43.